

THE GENERAL STATUTES OF NORTH CAROLINA

1965 CUMULATIVE SUPPLEMENT

Completely Annotated, under the Supervision of the Department
of Justice, by the Editorial Staff of the Publishers

 UNDER THE DIRECTION OF
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Volume 2A

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Preface

This Cumulative Supplement to Recompiled Volume 2A contains the general laws of a permanent nature enacted at the 1951, 1953, 1955, 1956, 1957, 1959, 1961, 1963 and 1965 Sessions of the General Assembly, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein prior to 1961 appears in Replacement Volumes 4B and 4C. The Cumulative Supplements to such volumes contain an index to statutes codified as a result of the 1961, 1963 and 1965 legislative sessions.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement, and any suggestions they may have for improving the General Statutes to the Division of Legislative Drafting and Codification of Statutes of the Department of Justice, or to The Michie Company, Law Publishers, Charlottesville, Virginia.



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Scope of Volume

Statutes:

Permanent portions of the general laws enacted at the 1951, 1953, 1955, 1956, 1957, 1959, 1961, 1963 and 1965 Sessions of the General Assembly affecting Chapters 28 through 52A of the General Statutes.

Annotations:

Sources of the annotations:

- North Carolina Reports volumes 230 (p. 577)-265 (p. 217).
- Federal Reporter 2nd Series volumes 175-347 (p. 320).
- Federal Supplement volumes 84-242 (p. 512).
- United States Reports volumes 338-381 (p. 531).
- Supreme Court Reporter volumes 70-85.
- North Carolina Law Review volumes 28-43 (p. 665).

The General Statutes of North Carolina 1965 Cumulative Supplement

VOLUME 2A

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ARTICLE 1.*Probate Jurisdiction.*

§ 28-1. Clerk of superior court has probate jurisdiction.—The clerk of the superior court of each county has jurisdiction, within his county, to take proof of wills and to grant letters testamentary, letters of administration with the will annexed, and letters of administration, in cases of intestacy, in the following cases:

Editor's Note.—For case law survey on wills and administration, see 41 N.C.L. Rev. 530 (1963).

Original Probate Jurisdiction Is Vested in Clerk.—Original jurisdiction of proceedings to probate a will is vested in the clerk. In re Will of Belvin, 261 N.C. 275, 134 S.E.2d 225 (1964).

Jurisdiction Exclusive.—

This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. Brissie v. Craig, 232 N.C. 701, 62 S.E.2d 330 (1950); Morris v. Morris, 245 N.C. 30, 95 S.E.2d 110 (1956).

The clerk of the superior court has exclusive original jurisdiction to take proofs of wills of persons dying domiciled within his county, and the jurisdiction of the clerk to take proof of a particular will is not affected by its loss or destruction before probate. Anderson v. Atkinson, 234 N.C. 271, 66 S.E.2d 886 (1951). See Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952); In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954).

The issue of whether an unprobated script is, or is not, a man's last will cannot be properly brought before the superior court for determination in an ordinary civil action. Anderson v. Atkinson, 234 N.C. 271, 66 S.E.2d 886 (1951). See Anderson v. Atkinson, 235 N.C. 300, 69 S.E.2d 603 (1952).

1.

The will of a resident of this State should be probated in the county of his domicile. In re Marks' Will, 259 N.C. 326, 130 S.E.2d 673 (1963).

3.

Will of Nonresident May Be Probated Where Property Situated.—When the will

But Authority to Appoint Administrator Is Limited by Section.—Authority to appoint an administrator is vested in the clerk of the superior court, but such authority is limited to the instances set forth in this section. In re Scarborough, 261 N.C. 565, 135 S.E.2d 529 (1964).

Petition Invoking Jurisdiction.—The jurisdiction of the clerk as probate judge is invoked by petition disclosing the requisite jurisdictional facts filed by some person entitled to qualify as executor or administrator. In re Estate of Pitchi, 231 N.C. 485, 57 S.E.2d 649 (1950).

When Jurisdiction Passes to Superior Court.—Where the respondents filed answer denying the petitioner's averment that the script offered for probate was the last will and testament of the decedent, such denial raised an issue of devisavit vel non and necessitated transfer of the cause to the civil issue docket for trial by jury, in accordance with § 1-273. This being so, jurisdiction to determine the whole matter in controversy, as well as the issue of devisavit vel non, passed to the superior court in term by authority of § 1-276. In re Will of Wood, 240 N.C. 134, 81 S.E.2d 127 (1954).

Cited in Mitchell v. Downs, 252 N.C. 430, 113 S.E.2d 892 (1960).

Domicile.—

See also In re Estate of Cullinan, 259 N.C. 626, 131 S.E.2d 316 (1963).

of a nonresident dying outside the State disposes of property in the State, the will

may be offered for original probate before the clerk of the county in which the property is situated. *In re Marks' Will*, 259 N.C. 326, 130 S.E.2d 673 (1963).

Appointment of Administrator Is Authorized Although Only Asset Is Wrongful Death Claim.—The language of subsection 3 authorizes the appointment of an administrator when deceased was not a resident of this State, did not die in this State, and had no assets in this State other than a right of action for wrongful death occurring outside the State but which can be enforced in the State because of the

4.

Cause of Action for Death, etc.—

Where death occurred as a result of a tort committed in this State, the cause of action given by the statutes of this State

5. Where the decedent, not being domiciled in this State, was at the time of his death a party to an action pending in the county of such clerk.

(1951, c. 765.)

Editor's Note.—The 1951 amendment inserted this subsection.

Only Part of Section Set Out.—Only

presence of the tort-feasor. *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529 (1964).

Where Judgment in Personam Is Obtainable.—The fact that a personal representative can obtain a judgment in personam on a cause of action for wrongful death which arose in another state is sufficient to authorize the clerk of the superior court to appoint an ancillary administrator under subsection 3. *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529 (1964).

Applied in *In re Brauff's Will*. 247 N.C. 92, 100 S.E.2d 254 (1957).

was an asset within the meaning of this section. *In re Scarborough*, 261 N.C. 565, 135 S.E.2d 529 (1964).

§§ 28-2.1, 28-2.2: Repealed by Session Laws 1965, c. 815, s. 4.

§ 28-2.3. Domiciliary and ancillary probate and administration.—The domiciliary, or original, administration of the estates of all decedents domiciled in North Carolina at the time of death shall be under the jurisdiction of this State and of a proper clerk of the superior court in this State, and the original probate of all wills of such persons shall be in this State. Any administration of the estate and any probate of a will of such decedents outside North Carolina shall be ancillary only. All assets, except real estate (but including proceeds from the sale of real estate), subject to ancillary administration in a jurisdiction outside North Carolina, shall, to the extent such assets are not necessary for the requirements of such ancillary administration, be transferred and delivered by the ancillary administrator to the duly qualified executor or administrator in this State for administration and distribution by the domiciliary executor or administrator, and the domiciliary executor or administrator in this State shall have the duty of collecting all such assets from the ancillary administrator. The receipt of the domiciliary executor or administrator shall fully acquit the ancillary administrator with respect to the assets covered thereby. The domiciliary executor or administrator in North Carolina shall have the exclusive right and duty to pay all federal and North Carolina taxes owed by the estate of such decedent and to make proper distribution of all assets including those collected from the ancillary administrator. (1963, c. 634.)

ARTICLE 3.

Right to Administer.

§ 28-6. Order in which persons entitled; nomination by person renouncing right to administer.

The right to administer on the estate of an intestate is entirely statutory. Generally speaking, the right is given to the

surviving spouse, the next of kin, the creditors, and other persons legally competent, in the order named. *In re Ed-*

wards' Estate, 234 N. C. 202, 66 S. E. (2d) 675 (1951).

Persons primarily entitled to administration shall assert their right and comply with the law within six months after the death of the intestate, and a party interested, wishing to quicken their diligence within that time, must do so by citation as prescribed by statute, or if a person, not preferred, applied for administration within six months, he must produce the written renunciation of the person or persons having prior right. *Royals v. Baggett*, 257 N. C. 681, 127 S. E. (2d) 282 (1962).

The term "next of kin" means those persons who take the surplus of the personal estate of an intestate under the statute of distribution. *In re Edwards' Estate*, 234 N. C. 202, 66 S. E. (2d) 675 (1951).

Only Child of Decedent Who Left No Widow.—Since the decedent left no widow, the petitioner, as his only child, would take the entire surplus of his personal estate under subdivision four of § 28-149. In consequence, the petitioner was the sole next of kin, and as such is the

§ 28-8. Disqualifications enumerated.

Nonresidence and Adverse Interests.—Findings that an administrator had moved from the jurisdiction of this State and had interests antagonistic to the estate is sufficient to support the clerk's order revoking letters of administration. *In re Sams' Estate*, 236 N. C. 228, 72 S. E. (2d) 421 (1952).

Appointee of Nonresident Kin.—

Delete paragraph in recomplied bound volume. See *Boynton v. Heartt*, 158 N. C. 488, 74 S. E. 470 (1912) holding that the right to nominate depends upon the right to administer.

Finding of Incompetency Based on Undisclosed and Unrecorded Information.—

§§ 28-10 to 28-12: Repealed by Session Laws 1961, c. 210, s. 2, effective Oct. 1, 1961.

Cross Reference.—For provisions covering the subject matter of repealed sections, see §§ 31A-1 to 31A-15.

§ 28-15. Failure to apply as renunciation.

In General.—

Persons primarily entitled to administration shall assert their right and comply with the law within six months after the death of the intestate, and a party interested, wishing to quicken their diligence within that time, must do so by citation as prescribed by statute, or if a

party primarily entitled to administration. Moreover, he had made timely application to the proper clerk for appointment as administrator. These things being true, the petitioner had absolute legal right to receive letters of administration, unless he was disqualified. *In re Edwards' Estate*, 234 N. C. 202, 66 S. E. (2d) 675 (1951).

The proviso in subsection (b) of this section means that the clerk in his sound discretion may refuse to issue letters of administration to a nominee if and when it is made to appear that, regardless of his personal competency, the nominee's relation to the interested parties and the estate is such that the clerk does not consider him a proper party to administer the estate. Obviously, the word "appointee" as used in the proviso refers to a person nominated for appointment in accordance with the prior provisions of this statute. *In re Cogdill's Estate*, 246 N. C. 602, 99 S. E. (2d) 785 (1957).

Cited in *In re Estate of Pitchi*, 231 N. C. 485, 57 S. E. (2d) 649 (1950).

Where the record shows that the conclusion of the clerk as to the alleged incompetency of the petitioner rests upon undisclosed and unrecorded information obtained by the clerk from third persons outside of court in the absence of the petitioner and his counsel, who were not apprised of the identity of such third persons or accorded any opportunity to cross-examine or confute them, the refusal of the clerk to issue letters of administration to the petitioner is error. *In re Edwards' Estate*, 234 N. C. 202, 66 S. E. (2d) 675 (1951).

Cited in *In re Covington's Will*, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

person, not preferred, applied for administration within six months, he must produce the written renunciation of the person or persons having prior right. *Royals v. Baggett*, 257 N. C. 681, 127 S. E. (2d) 282 (1962).

Cited in *In re Edwards Estate*, 234 N. C. 202, 66 S. E. (2d) 675 (1951).

§ 28-16. Person named as executor failing to qualify or renounce.

—When only one executor is appointed in a will and the person so appointed fails to qualify or renounce within thirty days after the will is admitted to probate, or when more than one executor is appointed in a will and all of the persons so appointed fail to qualify or renounce within thirty days after the will is admitted to probate, the clerk of the superior court on his own motion may issue, or on application of any interested party shall issue, a citation to each such person to show cause why he should not be deemed to have renounced. If, upon service of the citation, he does not qualify or renounce within such time, not exceeding thirty days, as is allowed in the citation, an order must be entered by the clerk decreeing that such person has renounced his appointment as executor.

(1953, c. 78, s. 1.)

Editor's Note.—

The 1953 amendment rewrote the first sentence of the first paragraph Section 2 of the amendatory act provided: "This act shall apply only in the case of wills admitted to probate on and after July 1, 1953, and wills admitted to probate prior to July 1, 1953, shall be governed by the

law in existence at the time of admission to probate."

As the second paragraph was not affected by the amendment it is not set out.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 377.

Cited in *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957).

ARTICLE 4.*Public Administrator.***§ 28-19. Bond.**

Local Modification.—Wake: 1957, c. 636.

ARTICLE 5.*Administrator with Will Annexed.***§ 28-22. When letters cum testamento annexo issue.**

Applied in *In re Johnson's Estate*, 233 N. C. 570, 65 S. E. (2d) 12 (1951).

§ 28-24. Administrator cum testamento annexo must observe will.

An administrator c. t. a. has no greater rights and powers, and is not subject to greater duties, than the executor named in the will. Since an executrix named in a will became by the distribution of personal property pursuant to the terms of the will, functus officio as to such prop-

erty, necessarily the administrator c. t. a. appointed by the court after the death of executrix was also functus officio as to such property. *Darden v. Boyette*, 247 N. C. 26, 100 S. E. (2d) 359 (1957).

Quoted in *Mitchell v. Downs*, 252 N. C. 430, 113 S. E. (2d) 892 (1960).

ARTICLE 6.*Collectors.*

§ 28-25. Appointment of collectors.—When, for any reason other than a situation provided for in chapter 28A entitled "Estates of Missing Persons," a delay is necessarily produced in the administration [admission] of a will to probate, or in granting letters testamentary, letters of administration, or letters of administration with the will annexed, the clerk may issue to some discreet person or persons, at his option, letters of collection, authorizing the collection and preservation of the property of the decedent. (R. C., c. 46, s. 9; C. C. P., s. 463; 1868-9, c. 113, s. 115; Code, s. 1383; Rev., s. 22; C. S., s. 24; 1924, c. 43; 1965, c. 815, s. 2.)

Editor's Note.—

The 1965 amendment added "other than a situation provided for in chapter 28A en-

titled 'Estates of Missing Persons'" and eliminated the former second sentence which had provided for the appointment of

collectors in case of delay in the production of positive proof of the unknown death of any person.

The word "admission" in brackets is suggested as a correction of "administra-

tion," which appears in the 1965 Session Laws.

Applied in *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957).

§ 28-28. When collector's powers cease; duty to account.

Cited in *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957).

ARTICLE 7.

Appointment and Revocation.

§ 28-32. Letters revoked on application of surviving husband or widow or next of kin, or for disqualification or default. — If, after any letters have been issued, it appears to the clerk, or if complaint is made to him on affidavit, that the surviving husband or widow or next of kin in the order of priority set out in subsections 1 and 2 of § 28-6 applies for letters of administration on said estate; and notwithstanding said applicants may have renounced their right to administer, if otherwise qualified, or that any person to whom they were issued is legally incompetent to have such letters, or that such person has been guilty of default or misconduct in due execution of his office, or that issue of such letters was obtained by false representations made by such person, or that such person has removed himself from the State, the clerk shall issue an order requiring such person to show cause why the letters should not be revoked. On the return of such order, duly executed, or by return of such order, not executed but with endorsement by the sheriff of the county of last known address that such person cannot be found in the county, if the objections are found valid, the letters issued to such person must be revoked and superseded, and his authority shall thereupon cease. (C. C. P., s. 470; Code, s. 2171; Rev., s. 38; C. S., s. 31; 1921, c. 98; 1953, c. 795.)

Editor's Note.—

The 1953 amendment inserted the words "or that such person has removed himself from the State" in the first sentence, and in the last sentence the words "or by return of such order, not executed but with endorsement by the sheriff of the county of last known address that such person cannot be found in the county."

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 377.

This section prescribes procedure for the removal of a particular person as administrator for causes specified therein; and, upon removal of such person, the clerk must immediately appoint some other person to succeed in the administration of the estate under § 28-33. *In re Bane*, 247 N. C. 562, 101 S. E. (2d) 369 (1958).

"Legally Competent." — The lawmakers did not define the term "legally competent," but left the interpretation thereof to the courts. In the sense used by the lawmakers, the term "legally competent" means fit or qualified to act as officer of the court and as trustee in administering upon the estate of testator according to judicial standards essential to the proper course of justice in the judicial department

of government. *In re Covington's Will*, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

Clerk Has Primary and Original Jurisdiction.—

In accord with original. See *McMichael v. Proctor*, 243 N. C. 479, 91 S. E. (2d) 231 (1956).

Finding Sufficient to Support Revocation. — Findings that an administrator had moved from the jurisdiction of this State and had interests antagonistic to the estate is sufficient to support the clerk's order revoking letters of administration. *In re Sams' Estate*, 236 N. C. 228, 72 S. E. (2d) 421 (1952).

Order of revocation of letters testamentary was justified where the clerk made a finding that executor had refused to pay widow her share from the sale of personal property, and that he had arbitrarily mixed and commingled funds of the estate with funds of the widow. *In re Boyles' Estate*, 243 N. C. 279, 90 S. E. (2d) 399 (1955).

Failure of Nonresident Executrix to Appoint Process Agent. — The failure and refusal by a nonresident executrix to appoint a process agent as required by § 28-186 is sufficient ground under this sec-

tion for her removal. *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957).

Verified Petition for Removal. — The clerk of the superior court has jurisdiction to entertain verified petition for the removal of an administrator. *In re Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223 (1950).

Filling Vacancy. — Where, in proceedings for removal of an administrator, the ad-

ministrator resigns, a vacancy occurs and the clerk has authority to appoint a successor. *In re Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223 (1950).

Cited in *In re Tatum's Will*, 233 N. C. 723, 65 S. E. (2d) 351 (1951); *In re Cogdill's Estate*, 246 N. C. 602, 99 S. E. (2d) 785 (1957).

§ 28-33. On revocation, successor appointed and estate secured.

Cross Reference. — See note to § 28-32.

ARTICLE 8.

Bonds.

§ 28-34. Bond; approved; condition; penalty.

When Bond Not Essential. —

The giving of the bond is not an essential of the act of appointment itself. *In re Estate of Pitchi*, 231 N. C. 485, 57 S. E. (2d) 649 (1950).

The failure to give a bond or the giving of an insufficient bond is only an irregularity, in no way affecting the validity of the appointment. The irregularity makes the letters of administration voidable only—a condition which may be cured by full compliance with the statute since the letters once issued are not subject to collateral attack. *In re Estate of Pitchi*, 231 N. C. 485, 57 S. E. (2d) 649 (1950).

Irregularity Cured by Giving Proper Bond. — Where, upon service of order to show cause why letters of administration should not be revoked for failure of the administrator to give bond, the administrator files bond with sufficient surety which is approved by the clerk, the irregularity is cured and the denial of the motion to vacate the letters of administration is not error. *In re Estate of Pitchi*, 231 N. C. 485, 57 S. E. (2d) 649 (1950).

Stated in *State Trust Co. v. Toms*, 244 N. C. 645, 94 S. E. (2d) 806 (1956).

Cited in *Allen v. Currie*, 254 N. C. 636, 119 S. E. (2d) 917 (1961).

§ 28-35. When executor to give bond.

Stated in *State Trust Co. v. Toms*, 244 N. C. 645, 94 S. E. (2d) 806 (1956).

Cited in *Allen v. Currie*, 254 N. C. 636, 119 S. E. (2d) 917 (1961).

§ 28-38. No bond where will does not require bond and coexecutor a resident.

Cited in *Allen v. Currie*, 254 N. C. 636, 119 S. E. (2d) 917 (1961).

§ 28-39.1. Conveyances by foreign executors validated. — If any nonresident executor, acting under a power of sale contained in the last will and testament of a citizen and resident of another state or foreign country, executed according to the laws of this State and duly proven and recorded in the state or foreign country wherein the testator and his family and said executor resided, and now or hereafter recorded in this State, shall have sold and conveyed real estate situated in this State prior to January first, one thousand nine hundred and fifty-seven, then said sale and conveyance so had and made shall be as valid and sufficient in law as though such executor had given bond and obtained letters of administration in this State prior to the execution of such deed. (1945, c. 652, 1957, c. 320.)

Editor's Note. — The 1957 amendment substituted "one thousand nine hundred and forty-five" for "one thousand nine and fifty-seven" for "one thousand nine hundred and forty-five."

§ 28-40. Oath and bond required before letters issue.

Cited in *In re Covington's Will*, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

ARTICLE 9.

Notice to Creditors.

§ 28-47. Advertisement for claims.—Every executor, administrator and collector within twenty days after the granting of letters, shall notify all persons, firms and corporations having claims against the decedent to exhibit the same to such executor, administrator or collector, on or before a day to be named in such notice; which day must be six months from the day of the first publication of such notice. The notice shall be published once a week for four consecutive weeks in a newspaper qualified to publish legal advertisements, if any such newspaper is published in the county. If there is no newspaper published in the county, but there is a newspaper having general circulation in the county, then at the option of the executor, administrator, or collector, the notice shall be published in the newspaper having general circulation in the county and posted at the courthouse or the notice shall be posted at the courthouse and four other public places in the county. Personal representatives are not required to publish the notices herein provided for when the deceased person did not own any real property or any interest in real property at the time of his death and the only assets of the estate consists of proceeds received for wrongful death. (1868-9, c. 113, s. 29; 1881, c. 278, s. 2; Code, ss. 1421, 1422; Rev., s. 39; C. S., s. 45; 1945, c. 635; 1949, c. 47; c. 63, s. 1; 1955, c. 625; 1961, c. 26, s. 1; c. 741, s. 1.)

Editor's Note. — The 1955 amendment rewrote the third sentence.

The first 1961 amendment, effective July 1, 1961, substituted "four" for "six" in line six.

The second 1961 amendment, effective Oct. 1, 1961, reduced the time for making

claims against decedents' estates from twelve to six months. It also inserted following the word "persons" in line two the words "firms and corporations."

Cited in Spivey v. Godfrey, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

§ 28-47.1. Filing of final account after six months.—Upon the satisfaction of all the requirements set forth in G. S. 28-47 and at the expiration of the six-month period referred to therein, the personal representative may, if all claims filed for outstanding debts and obligations of the decedent are met and satisfied, in case of a solvent estate, or satisfied pro rata according to applicable statutes, in case of an insolvent estate file his final account with the clerk of superior court, said final account to be audited and recorded by the clerk; provided, however, this shall not limit the right of persons to file for an allowance under the provisions of North Carolina G. S. 30-15 and 30-17 within one (1) year. (1963, c. 168.)

§ 28-48. Proof of advertisement.—A copy of the advertisement directed to be posted or published in pursuance of G. S. 28-47, with an affidavit, taken before some person authorized to administer oaths, of one of the persons authorized by G. S. 1-600 (a), to make affidavit, to the effect that such notice was published for four weeks in said newspaper, or an affidavit stating that such notices were posted, shall be filed in the office of the clerk by the executor, administrator or collector. The copy of the notice together with such affidavit shall be deemed a record of the court, and a copy thereof, duly certified by the clerk, shall be received as *prima facie* evidence of the fact of publication in all the courts of this State. (1868-9, c. 113, s. 31; Code, s. 1423; Rev., s. 40; C. S., s. 46; 1951, c. 1005, s. 3; 1961, c. 26, s. 2.)

Editor's Note. — The 1951 amendment rewrote this section.

The 1961 amendment, effective July 1,

1961, substituted "four" for "six" in line five.

§ 28-49. Personal notice to creditor.—The executor, administrator or collector may cause the notice to be personally served on any creditor, who shall, thereupon, within three months after personal service thereon, exhibit his claim,

or be forever barred from maintaining any action thereon. (1868-9, c. 113, s. 32; Code, s. 1424, 1885, c. 96; Rev., s. 41; C. S., s. 47; 1961, c. 741, s. 2.)

Editor's Note. — The 1961 amendment, effective Oct. 1, 1961, substituted "three" for "six" in line three. *Applied in In re Miles' Estate, 262 N.C. 647, 138 S.E.2d 487 (1964).*

ARTICLE 10.

Inventory.

§ 28-53. Trustees in wills to qualify and file inventories and accounts. — Trustees appointed in any will admitted to probate in this State, into whose hands assets come under the provisions of the will, shall first qualify under the laws applicable to executors, and shall file in the office of the clerk of the county where the will is probated inventories of the assets which come into his hands and annual and final accounts thereof, such as are required of executors and administrators. The power of the clerk to enforce the filing and his duties in respect to audit and record shall be the same as in such cases. This section shall not apply to the extent that any will makes a different provision. (1907, c. 804; C. S., § 51; 1961, c. 519; 1965, c. 1176, s. 1.)

Editor's Note. — The 1961 amendment, effective July 1, 1961, inserted beginning in line two the words "first qualify under the laws applicable to executors, and shall." The amendatory act provides that it shall apply with respect to all wills probated on or after said date.

The 1965 amendment, effective July 1, 1965, inserted "which come into his hands" near the end of the first sentence and rewrote the last sentence. Section 2 of the amendatory act provides: "To the extent that G.S. 28-53, as amended by chapter 519

of the Session Laws of 1961, and as further amended by this act, would require that trustees appointed by a will must first qualify under the laws applicable to executors, such requirement shall not apply to trustees appointed by any will executed prior to July 1, 1961, unless the will has been admitted to probate prior to the effective date of this act."

Stated in Lichtenfels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

ARTICLE 11.

Assets.

§ 28-56.1. Federal income tax refunds; joint returns. — Upon the determination by the United States Treasury Department of an overpayment of income tax by a married couple filing a joint federal income tax return, one of whom has died since the filing of such return or where a joint federal income tax return is filed on behalf of a husband and wife, one of whom has died prior to the filing of the return, any refund of the tax by reason of such overpayment, if not in excess of five hundred dollars (\$500.00), shall be the sole and separate property of the surviving spouse. In the event that both spouses are dead at the time such overpayment is determined, such refund, if not in excess of five hundred dollars (\$500.00), shall be the sole and separate property of the estate of the spouse who died last and may be paid directly by the Treasury Department to the executor or administrator of such estate, or, in the absence of such executor or administrator, to the clerk of the superior court of the county of the domicile of the last surviving spouse, to be disbursed by him as provided by G. S. 28-68 and G. S. 28-68.2 and 28-68.3. (1955, c. 720; 1957, c. 986.)

Editor's Note. — The 1957 amendment inserted beginning in line four the words "or where a joint federal income tax return is filed on behalf of a husband and wife, one of whom has died prior to the filing of the return."

For brief comment on this section, see 33 N.C. Law Rev. 575.

§ 28-56.2. Same; separate returns. — Upon the determination by the United States Treasury Department of an overpayment of income tax by any

married person filing a separate return, any refund of the tax by reason of such overpayment, if not in excess of two hundred fifty dollars (\$250.00), exclusive of interest, shall be the sole and separate property of the surviving spouse, and the United States Treasury Department may pay said sum directly to such surviving spouse, and such payment to the extent thereof shall operate as a complete acquittal and discharge of the United States Treasury Department. (1961, c. 643.)

§ 28-56.3. State income tax refunds.—Upon the determination by the Commissioner of Revenue of North Carolina of an overpayment of income tax by any married person, any refund of the tax by reason of such overpayment, if not in excess of two hundred dollars (\$200.00), exclusive of interest, shall be the sole and separate property of the surviving spouse, and said Commissioner of Revenue may pay said sum directly to such surviving spouse, and such payment to the extent thereof shall operate as a complete acquittal and discharge of the Commissioner of Revenue. (1961, c. 735.)

§ 28-57. Proceeds of real estate sold to pay debts are personal assets.

Editor's Note.—For note as to applicability of equitable conversion doctrine to proceeds of sale of lands, etc., by personal representative, see 35 N. C. Law Rev. 347.

§ 28-61. Joint liability of heirs, etc., for debts.

Cited in Davis v. Singleton, 256 N. C. 596, 124 S. E. (2d) 563 (1962).

§ 28-68. Payment to clerk of money owed intestate.—(a) Any person indebted to an intestate may satisfy such indebtedness by paying the amount of the debt to the clerk of the superior court of the county of the domicile of the intestate—

- (1) If no administrator has been appointed, and
- (2) If the amount owed by such person does not exceed one thousand dollars (\$1,000.00), and
- (3) If the sum tendered to the clerk would not make the aggregate sum which has come into the clerk's hands belonging to the intestate exceed one thousand dollars (\$1,000.00).

(b) Such payments may not be made to the clerk if the total amount paid or tendered with respect to any one intestate would exceed one thousand dollars (\$1,000.00), even though disbursements have been made so that the aggregate amount in the clerk's hands at any one time would not exceed one thousand dollars (\$1,000.00).

(c) If a sum tendered pursuant to this article would make the aggregate sum coming into the clerk's hands with respect to any one intestate exceed one thousand dollars (\$1,000.00), the clerk shall appoint an administrator.

(d) If it appears to the clerk after making a preliminary survey that disbursements pursuant to subsection (a) of G. S. 28-68.2 would not exhaust funds received pursuant to G. S. 28-68, he may, in his discretion, appoint an administrator in such case. (1921, c. 93; Ex. Sess. 1921, c. 65; C. S., s. 65(a); Ex. Sess. 1924, cc. 15, 58; 1927, c. 7; 1929, cc. 63, 71, 121; 1931, c. 21; 1933, cc. 16, 94; 1935, cc. 69, 96, 367; 1937, cc. 13, 31, 55, 121, 336, 377; 1939, cc. 383, 384; 1941, c. 176; 1943, cc. 24, 114, 138, 560; 1945, cc. 152, 178, 555; 1947, cc. 203, 237; 1949, cc. 17, 81, 691, 762; 1951, c. 380, s. 1; 1959, c. 795, ss. 1-4.)

Local Modification.—Burke: 1959, c. 346; Caswell: 1959, c. 594; Cumberland: 1957, c. 105; Union: 1959, c. 663.

Editor's Note.—

Session Laws 1951, c. 380, rewrote former § 28-68 to appear as present §§ 28-68 through 28-68.4. For comment on the

amendment, see 29 N. C. Law Rev. 355. The 1959 amendment increased the amount mentioned in this section from five hundred to one thousand dollars.

Section Not Applicable to Surplus Realized on Foreclosure Sale.—The limitation of the amount payable to the clerk under

this section is not applicable to the surplus realized upon the foreclosure of a mortgage or deed of trust. Lenoir County v. Outlaw, 241 N. C. 97, 84 S. E. (2d) 330 (1954).

§ 28-68.1. Receipt of clerk.—The receipt from the clerk of the superior court of a payment purporting to be made pursuant to G. S. 28-68 is a full release to the debtor for the payment so made. (1951, c. 380, s. 1.)

§ 28-68.2. Disbursement by clerk.—(a) If no administrator has been appointed, the clerk of the superior court shall disburse the money received pursuant to G.S. 28-68 for the following purposes and in the following order:

- (1) To pay the surviving spouse's year's allowance and children's year's allowance assigned in accordance with law;
- (2) To pay any lawful claims for funeral expenses of the deceased, not to exceed six hundred dollars (\$600.00) as a preferred claim, or to reimburse any person for the payment thereof;
- (3) To pay any lawful claims for hospital, medical and doctor's bills for the last illness of the deceased, such period of last illness not to exceed twelve months, or to reimburse any person for the payment thereof.

(b) After the death of a spouse who died intestate and after disbursements have been made in accordance with subsection (a) of this section, the balance in his hands belonging to the estate of the intestate shall be paid to the surviving spouse, and if there is no surviving spouse, he shall pay same to the heirs or distributees in proportion to their respective interests.

(c) The clerk of the superior court shall not be required to publish notice to creditors. (1951, c. 380, s. 1; 1955, c. 1246, ss. 1-3; 1957, c. 491; 1965, c. 576, s. 1.)

Local Modification. — Edgecombe and Nash: 1953, c. 473, amended by 1955, c. 808; Greene: 1955, c. 808.

Editor's Note. — The 1955 amendment made changes in subdivision (2) of subsection (a), rewrote subsection (b) and added subsection (c).

The 1957 amendment substituted "two hundred and fifty dollars (\$250.00)" for "fifty dollars (\$50.00)" in line three of sub-

section (b).

The 1965 amendment substituted "surviving spouse's" for "widow's" in subdivision (1) of subsection (a), rewrote subdivision (2) and added subdivision (3) in that subsection and rewrote subsection (b).

For brief comment on this section, see 36 N. C. Law Rev. 42.

§ 28-68.3. Transfer of funds to administrator; commissions.—Whenever an administrator is appointed after a clerk of the superior court has received any money pursuant to G. S. 28-68, the clerk shall pay to the administrator all funds which have not been disbursed. The clerk shall receive no commission for making such payment to the administrator, and the administrator shall receive no commission for receiving such payment from the clerk. (1951, c. 380, s. 1.)

§ 28-68.4: Repealed by Session Laws 1965, c. 576, s. 2.

ARTICLE 13.

Sales of Personal Property.

§ 28-73. Executor or administrator may sell without court order.

Quoted in Poindexter v. First Nat. Stated in Gomer v. Askew, 242 N. C. Bank, 244 N. C. 191, 92 S. E. (2d) 773 547, 89 S. E. (2d) 117 (1955). (1956).

§ 28-75. Terms and notice of public sale.—All public sales of personal estate by executors or administrators shall be made on credit or for cash after ten days' notification posted at the courthouse and four public places in the county.

(1868-9, c. 113, ss. 18, 19; Code, ss. 1410, 1411; Rev., s. 63; C. S., s. 68; 1949, c. 719, s. 2; 1951, c. 60.)

Editor's Note.—

The 1951 amendment changed the period of notification from twenty to ten days.

ARTICLE 14.

Sales of Real Property.

§ 28-81. Sales of realty ordered, if personalty insufficient for debts; petition for partition.—When it is alleged and shown that the personal estate of a decedent is insufficient to pay all of his debts, including the charges of administration, it shall not be necessary that the personal property of such decedent be first exhausted, and the executor, administrator or collector may, at any time after the grant of letters, apply to the superior court of the county where the land or some part thereof is situated, by petition, to sell the real property for the payment of the debts of such decedent.

When it is alleged and shown that the real property of the decedent consists in whole or in part of an undivided interest in real property, and that sale of such undivided interest is necessary to make sufficient assets to pay debts, including the charges of administration, the personal representative of the decedent may, at the time of applying by petition to sell the real property to make assets, apply by petition for partition of the lands in which the decedent held an undivided interest. Such petition for partition may be joined as a part of the petition to sell the real property, and, when the personal representative petitions for the sale of such undivided interest to make assets, he is a proper party petitioner to the same effect as if he were a joint tenant or tenant in common. (1868-9, c. 113, s. 42; Code, s. 1436; Rev., s. 68; C. S., s. 74; 1923, c. 55; 1935, s. 43; 1937, c. 70; 1943, c. 637; 1949, c. 719, s. 2; 1955, c. 302, s. 1; 1959, c. 879, s. 7; 1963, c. 291, s. 1.)

Editor's Note.—

The 1955 amendment rewrote the first sentence of this section.

The 1959 amendment, effective July 1, 1960, struck out all of this section following the first sentence.

The 1963 amendment added the second paragraph.

Section 2 of the 1955 amendatory act validated all sales of realty consummated under G S 28-81 prior to March 24, 1955, to the extent that said sales were held without first exhausting the personal property.

For brief comment on the 1955 amendment, see 33 N. C. Law Rev 513.

Essential Fact Is Insufficiency of Personal Property to Pay Debts. The essential fact to be found to enable an administrator to maintain a proceeding to sell land to make assets under this and sections following is the insufficiency of per-

sonal property to pay the debts of the decedent. Therefore there must be definite statements in the petition as to the amount of debts outstanding against the estate, and as to the personal estate, to enable the court to see that there is such insufficiency of personal property. And the respondents, heirs at law, who are required to be made parties to the proceeding, have the right to plead any defense against a debt for which sale of the lands are to be made. *Poindexter v. First Nat. Bank*, 247 N. C. 606, 101 S. E. (2d) 682 (1958).

Applied in *Clapp v. Clapp*, 241 N. C. 281, 85 S. E. (2d) 153 (1954); *Nunn v. Gibbons*, 249 N. C. 362, 106 S. E. (2d) 499 (1959).

Cited in *Turner v. Turner*, 242 N. C. 533, 89 S. E. (2d) 245 (1955); *Robertson v. Robertson*, 253 N. C. 376, 116 S. E. (2d) 849 (1960); *Brenkworth v. Lanier*, 260 N.C. 279, 132 S.E.2d 623 (1963).

§ 28-83. Conveyance of lands by heirs within two years voidable; conditions for valid conveyance; judicial sale for partition.—All conveyances of real property of any decedent made by any devisee or heir at law within two years of the death of the decedent shall be void as to the creditors, executors, administrators and collectors of such decedent, except as hereinafter provided, but

such conveyances to bona fide purchasers for value and without notice, if made after two years from the death of the decedent, or if made after the filing of the final account by the duly authorized executor or administrator of the decedent and the approval thereof by the clerk of the superior court having jurisdiction of the estate, shall be valid even as against creditors; Provided, that if the decedent was a nonresident, such conveyances shall not be valid unless made after two years from the grant of letters. But such conveyances shall be valid, if made five years from the death of a nonresident decedent, notwithstanding no letters testamentary or letters of administration shall have been granted. Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for same to be valid as against creditors, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime an action or proceeding shall have been instituted in the proper court to subject the land therein described to payment of the decedent's debts.

In the absence of fraud participated in by the grantee conveyances of real property by warranty deed executed by the heirs-at-law or devisees of resident or nonresident decedents, with the joinder of the personal representative, if made within two (2) years after the death of the decedent and at least six (6) months after first publication of notice as provided by G. S. 28-47, shall not be voidable as to the creditors of such decedents if all of the following conditions are complied with:

- (1) The personal representative shall have given increased bond in an amount equal to the net proceeds realized from the sale of the property;
- (2) All the proceeds from the sale of such real property are paid directly to the personal representative of the decedent;
- (3) All proceeds from the sale of such property are placed by the personal representative in a separate escrow account, or, under proper court order, are invested in approved securities pending final closing of the estate;
- (4) The instrument of conveyance carries a certification of the personal representative that he has received from the grantee, the full purchase price from the sale;
- (5) The sale is approved by an order of the clerk of the superior court of the county in which the administration of the estate is pending, pursuant to a determination by said clerk, supported by affidavits of at least two freeholders of the county in which said real property is located, that the sales price represents the fair market value of said real property.

Funds or other assets held by the personal representative under the provisions of subdivision (3) hereof after the payment of all debts and charges of administration of the estate shall be distributed by the personal representative to the persons entitled, simultaneously with the filing and approval of the final account by such personal representative. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into their hands, as may be necessary to discharge the claims of creditors.

A judicial sale of real property of a decedent hereafter made under order of a court of competent jurisdiction for partition shall be valid as to creditors, executors, administrators and collectors of such decedent irrespective of the time made. If such sale is made within two years of death of such decedent or before the estate shall have been fully administered the personal representative of such decedent must be joined as plaintiff or made a party defendant. The court shall in the order of confirmation of any sale made within two years of the death of a decedent set aside such part of the proceeds of sale representing the interest of such decedent for application upon the debts, if any, of the decedent by requir-

ing payment of the same into the hands of such personal representative or of the court itself, to be held by such personal representative or the court subject to claims of creditors for a period of two years from date of death of decedent, or until such estate is fully administered. Personal representatives shall be allowed commissions on only so much of said proceeds of sale, so coming into their hands, as may be necessary to discharge the claims of creditors. (1868-9, c. 113, s. 105; Code, s. 1442; Rev., s. 70; C. S., s. 76; 1935, c. 355; 1939, c. 16; 1943, cc. 411, 763; 1947, c. 112; 1963, c. 449.)

Editor's Note.—

The 1963 amendment inserted all of this section between the first and last para-

graphs.

Cited in *Pulliam v. Thrash*, 245 N. C. 636, 97 S. E. (2d) 253 (1957).

§ 28-86. Contents of petition for sale.

Allegation That Decedent Left No Personal Estate.—Where the petition alleges that the decedent left no personal estate so far as could be ascertained, it is sufficient on this aspect, and demurrer on the ground that the petition failed to set forth

the value of the estate, as near as may be ascertained, and the application thereof, is properly overruled. *Clapp v. Clapp*, 241 N. C. 281, 85 S. E. (2d) 153 (1954).

Applied in *Nunn v. Gibbons*, 249 N. C. 362, 106 S. E. (2d) 499 (1959).

§ 28-87. Heirs and devisees necessary parties.

Applied in *Nunn v. Gibbons*, 249 N. C. 362, 106 S. E. (2d) 499 (1959).

§ 28-90. Order granted, if petition not denied; procedure for sale.

Unsigned Decree of Sale.—It is not essential to the validity of the decree that it should be signed. *Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797 (1895), decided under former statute.

Decree Not Conclusive of Debts.—The

decree of the sale is not conclusive of the debts recited by the personal representative in his application for the sale of the land. *Latta v. Russ*, 53 N. C. 111 (1860), decided under former statute.

§ 28-98. Death of vendor under contract; representative to convey.

Judgment against Administrator Ineffectual against Heir.—Under Art. I, sec. 17, of the Constitution, a judgment cannot bind a person unless he comes or is brought before the court in some way sanctioned by law and afforded an opportunity to be heard in defense of his rights. As an inexorable consequence of this con-

stitutional provision, any judgment which may be rendered in an action against a decedent's administrator will be wholly ineffectual as against an heir of the decedent, who is not a party to such action, even though such action is predicated upon this section. *Scott v. Jordan*, 235 N. C. 244, 69 S. E. (2d) 557 (1952).

§ 28-99. Title in representative for estate; he or successor to convey.

Local Modification.—

Brunswick: 1951, c. 8; Forsyth: 1951, c. 8.

§ 28-101. Presumption; burden of proof.

Cited in *State v. Scoggin*, 236 N. C. 19, 72 S. E. (2d) 54 (1952).

§ 28-103. Validation of certain bona fide sales of real estate to pay debts made without order of court.

Cited in *State v. Scoggin*, 236 N. C. 19, 72 S. E. (2d) 54 (1952).

ARTICLE 15.

*Proof and Payment of Debts of Decedent.***§ 28-105. Order of payment of debts.****Strict Construction.—**

In accord with original. See Underwood v. Ward, 239 N. C. 513, 80 S. E. (2d) 267 (1954).

Section Does Not Affect Validity of Unrecorded Chattel Mortgage.—This statu-

tory provision does not bear upon whether an unrecorded chattel mortgage, valid as against the intestate, is to like extent valid against his estate. Coastal Sales Co. v. Weston, 245 N. C. 621, 97 S. E. (2d) 267 (1957).

First class.

The evident purpose of this section relating to debts of the first class is to benefit the estate, particularly the creditors thereof next in line for payment. Underwood v. Ward, 239 N. C. 513, 80 S. E. (2d) 267 (1954).

No Equity Preserved in Land in Which Estate Has No Interest.—Since the priority of the first class is limited to a situation where the value of the property equals or exceeds the amount of the specific lien thereon, the personal representative may preserve any equity for the benefit of other creditors and of beneficiaries. But where the estate and its creditors and beneficiaries have no right, title or interest in the real property on which the creditor has a specific lien, no equity can be preserved. Underwood v. Ward, 239 N. C. 513, 80 S. E. (2d) 267 (1954).

Notes Secured by Liens on Lands Held by Entireties.—Husband and wife were jointly and severally liable on notes se-

cured by liens on lands held by them by entireties. Upon the death of the husband, the liability of his estate for one-half the balance due on the notes at the time of his death is not a debt coming within the first class of priority, since even though the debt is secured by specific lien on the property, the property is not an asset of the estate. Underwood v. Ward, 239 N. C. 513, 80 S. E. (2d) 267 (1954).

Holder of Secured Note Must Exhaust Security and Then File Claim for Balance.—The holder of a note executed or assumed by the deceased, and secured by a deed of trust or mortgage, must first exhaust the security and apply the same on the debt, and may then file a claim against the estate for the balance due, if any. But the holder of such note may not file claim and receive pro rata dividend on the basis of the full claim. Montsinger v. White, 240 N. C. 441, 82 S. E. (2d) 362 (1954).

Second class. Funeral expenses to the extent of six hundred dollars (\$600.00). This limitation shall not include cemetery lot or gravestone.

(1955, c. 641, s. 1.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, added the limitation to funeral expenses. Section 1 of the amendatory act also provides: "Nothing herein contained shall be construed to affect the provisions of G. S. 28-120, or 28-

120.1." Section 3 thereof provides that "this act shall not apply to funerals contracted for prior to July 1, 1955." As only the provision as to second class debts was changed, the rest of the section is not set out.

Third class.

Tax-Sale Certificate Is Not a Preferred Claim.—

Add to Editor's Note under this cap-

tion recompiled volume: However, a similar provision now appears in § 105-391.

Seventh class.

Federal Estate Tax.—The word "debts" as used in this section includes the federal estate tax. The statute specifically names "Dues to the United States" as debts of the decedent which must be paid, and concludes with the all-embracing clause "all other debts and demands." The obli-

gation to pay taxes is regarded as a personal debt due the United States. Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 73 S. E. (2d) 879 (1953); Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963); Adams v. Adams, 261 N.C. 342, 134 S.E.2d 633 (1964).

§ 28-105.1. Satisfaction of debts other than by payment.—Notwithstanding any provision of law to the contrary,

- (1) If a decedent was liable in person at the time of his death for the payment or satisfaction of any debt or the performance, satisfaction or discharge of any liability or obligation, whether joint or several, primary or secondary, direct or contingent, or enforceable in any other manner or form whatsoever, or
- (2) If only the property of a decedent or some part thereof was liable at the time of his death for the payment or satisfaction of any debt or the performance, satisfaction or discharge of any liability or obligation, whether joint or several, primary or secondary, direct or contingent, or enforceable in any other manner or form against the property of the decedent but not against him or his estate as a personal liability, and
- (3) If any person other than the personal representative of the decedent is willing to assume the liability of the decedent and of his estate or to receive or accept property of the decedent subject to such liability in cases where the decedent was not personally liable and the creditor, obligee or other person for whose benefit such liability exists is willing to accept an agreement with that effect and to discharge the personal representative of the decedent and the estate of the decedent from the payment, satisfaction or discharge of such liability, and
- (4) If such creditor, obligee or other person for whose benefit such liability exists and the person assuming the liability or the person receiving or accepting the property of the decedent subject to such liability shall execute, acknowledge and deliver in the form and manner required for deeds conveying real property in North Carolina, an agreement between themselves as to such assumption of liability or the receipt or acceptance of property of the decedent subject to such liability which shall contain a release, as hereinafter defined, discharging the personal representative of the decedent and his estate from the payment, satisfaction, or discharge of the liability, and thereafter the said creditor, obligee or other person for whose benefit such liability exists shall have no remedy for the enforcement thereof except against the person assuming it or against the property subject to it as provided in the said agreement;

then upon the filing with the clerk of superior court having jurisdiction over the estate and personal representative of one duplicate original of the said agreement, or of a certified copy thereof if it is a duly recorded instrument, the same shall be accepted in the same manner as a voucher showing payment or discharge of the said liability in the accounts of the personal representative of the decedent.

The word "person" as used in this § 28-105.1 shall include one or more natural persons, corporations, partnerships, or entities having the power to own property or to make contracts in regard thereto. The word "release" as used in this § 28-105.1 shall include a covenant not to sue in any case in which an unqualified release or discharge of one obligee would discharge another, and if the liability involved is a negotiable instrument or other instrument transferable to a holder in due course, such release shall not be effective unless notice thereof is endorsed on the instrument involved, dated and signed by the creditor or the holder of the indebtedness or person for whose benefit the property is encumbered. (1965, c. 1149.)

§ 28-112. Disputed debt not referred, barred in three months.—If a claim is presented to and rejected by the executor, administrator or collector, and not referred as provided in § 28-111, the claimant must, within three months, after due notice in writing of such rejection, or after some part of the debt becomes due, commence an action for the recovery thereof, or be forever barred

from maintaining an action thereon. (1868-9, c. 113, s. 35; Code, s. 1427; Rev., s. 93. 1913, c. 3, s. 1; C. S., s. 100; 1961, c. 742.)

Editor's Note. — The 1961 amendment, effective Oct. 1, 1961, substituted "three" for "six" in the caption and in line three.

The language of this section is positive and explicit, etc.—

In accord with original. See Rutherford v. Harbison, 254 N. C. 236, 118 S. E. (2d) 540 (1961).

Rejection of Claim Must Be Absolute and Unequivocal.—The rejection of a claim

against an estate must be absolute and unequivocal in order to start the running of the six months (now three months) statute of limitation. Rutherford v. Harbison, 254 N. C. 236, 118 S. E. (2d) 540 (1961).

Applied in Bourne v. Edwards, 238 N. C. 261, 77 S. E. (2d) 616 (1953); Hargrave v. Gardner, 264 N.C. 117, 141 S.E.2d 36 (1965).

§ 28-113. If claim not presented in six months, representative discharged as to assets paid.—In an action brought on a claim which was not presented within six months from the first publication of the general notice to creditors, the executor, administrator or collector shall not be chargeable for any assets that he may have paid in satisfaction of any debts, legacies or distributive shares before such action was commenced; nor shall any costs be recovered in such action against the executor, administrator or collector. (1868-9, c. 113, s. 37; Code, s. 1428; Rev., s. 94; C. S., s. 101; 1961, c. 741, s. 3.)

Editor's Note. — The 1961 amendment, effective Oct. 1, 1961, substituted "six" for "twelve" in the caption and in line two.

Representative Is Discharged as to Assets Paid Out.—By the provisions of this section, if a claim is not presented in six months, the representative is discharged as to assets paid. In re Miles' Estate, 262 N.C. 647, 138 S.E.2d 487 (1964).

But Claim Can Be Asserted against Undistributed Assets.—This section, if appli-

cable, would only bar petitioner's claim for damages for wrongful death as to assets paid out by appellant, and he could still assert his demand against undistributed assets of the estate and without cost against the administratrix c.t.a. of the estate. In re Miles' Estate, 262 N.C. 647, 138 S.E.2d 487 (1964).

Cited in Lenoir County v. Outlaw, 241 N.C. 97, 84 S. E. (2d) 330 (1954); Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

ARTICLE 16.

Accounts and Accounting.

§ 28-117. Annual accounts.—Every executor, administrator and collector shall, within thirty days after the expiration of one year from the date of his qualification or appointment and annually, so long as any of the estate remains in his control, file, in the office of the clerk of the superior court, an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk may examine on oath such accounting party or any other person, concerning the receipts disbursements or any other matter relating to the estate; and, having carefully revised and audited such account, if he approve the same he must endorse his approval thereon which shall be deemed *prima facie* evidence of correctness. (C. C. P., s. 478; 1871-2, c. 46; Code, s. 1399; Rev. s. 99; C. S., s. 105; 1957, c. 783, s. 5.)

Editor's Note. — The 1957 amendment substituted in line two the words "thirty days after the expiration of one year" for "twelve months."

Cited in State v. Scoggins, 236 N. C. 19, 72 S. E. (2d) 54 (1952); Davis v. Davis, 246 N. C. 307, 98 S. E. (2d) 318 (1957).

§ 28-118. Clerk may compel account.

Court which appointed fiduciary may, *ex mero motu*, compel a proper accounting by attachment for contempt. Lichten-

fels v. North Carolina Nat'l Bank, 260 N.C. 146, 132 S.E.2d 360 (1963).

Or Accounting May Be Compelled by

Special Proceedings or Civil Action.—An executor or administrator, as well as a trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action,

or the court which appointed them may, *ex mero motu*, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

§ 28-118.1. Removal of fiduciaries who cannot be found.—Whenever any inventory, account or report required by law to be filed with the clerk of the superior court by any executor, administrator, collector, guardian, trustee, personal representative or other fiduciary accountable to the clerk of the superior court is overdue, and citation or notice issued by the clerk to be served in the county of the address last reported by such fiduciary to the clerk is returned unserved because the fiduciary cannot be found, the clerk may, after ten (10) days following the return of such citation unserved, order his removal without further notice. A copy of such citation shall be served on the surety or sureties, if any, of such fiduciary, if the surety be found in the county of his last known address. (1961, c. 418.)

§ 28-119. Vouchers presumptive evidence.

Cited in *State v. Scoggin*, 236 N. C. 19, 72 S. E. (2d) 54 (1952).

§ 28-120. Gravestones authorized.—It is lawful for executors and administrators to provide suitable gravestones to mark the graves of their testators or intestates, and to pay for the cost of erecting the same, and the cost thereof shall be paid as funeral expenses and credited as such in final accounts. The costs thereof shall be in the sound discretion of the executor or administrator, having due regard to the value of the estate and to the interests of creditors and needs of the widow and distributees of the estate. Where the executor or administrator desires to spend more than four hundred dollars for such purpose he shall file his petition before the clerk of the court, and such order as will be made by the court shall specify the amount to be expended for such purpose. Provided, however, that if the net estate is of a value in excess of twenty-five thousand dollars (\$25,000), the executor or administrator may, in his discretion, expend not more than eight hundred dollars (\$800) for this purpose without securing the order of court required herein. (1905, c. 444; Rev., s. 102; C. S., s. 108; 1925, c. 4; 1941, c. 102; 1951, c. 373.)

Editor's Note.—

The 1951 amendment increased the

amount which executors and administrators may spend for gravestones.

§ 28-121. Final accounts.

Cited in *Davis v. Davis*, 246 N. C. 98 S. E. (2d) 318 (1957).

§ 28-121.1. Final accounts; immediate settlement.

Report on Disposition of Proceeds.—Pursuant to this section it is the practice that a personal representative, who has received proceeds for wrongful death, shall

file a report in the probate court of the disposition made of such proceeds. *King v. Cooper Motor Lines, Inc.*, 142 F. Supp. 405 (1956).

§ 28-122. Creditor's proceeding

All fiduciaries may be compelled by appropriate proceedings to account for their handling of properties committed to their care. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

By Special Proceedings, Civil Action or Attachment for Contempt.—An executor or administrator, as well as a trustee or successor trustee performing duties im-

for accounting.

posed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action, or the court which appointed him may, *ex mero motu*, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

§ 28-147. Suits for accounting at term.

Extent of Jurisdiction Generally.—

In accord with original. See *Wachovia Bank & Trust Co. v. Waddell*, 234 N. C. 454, 67 S. E. (2d) 651 (1951).

The superior court is given concurrent jurisdiction with the probate courts, etc.—

In accord with 1st paragraph in original. See *Rudisill v. Hoyle*, 254 N. C. 33, 118 S. E. (2d) 145 (1961).

All fiduciaries may be compelled by appropriate proceedings to account for their handling of properties committed to their care. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

An executor or administrator, as well as a trustee or successor trustee performing duties imposed upon the executors by a testamentary trust, may be compelled to account by special proceedings or civil action, or the court which appointed them may, ex mero motu, compel a proper accounting by attachment for contempt. *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

Section Authorizes Actions in Nature of Bills to Surcharge and Falsify Accounts.— This section authorizes actions in the superior court in the nature of bills in equity to surcharge and falsify the accounts of administrators. *Kearns v. Primm*, 263 N.C. 423, 139 S.E.2d 697 (1965).

Suit in Nature of Creditor's Action.— An action to compel an executor to account and make settlement is necessarily a suit in the nature of a creditor's action. *Davis v. Davis*, 246 N. C. 307, 98 S. E. (2d) 318 (1957).

Discretion of Court.— The matter of the approval of an agreement settling a widow's year's allowance and dower claim rests in the sound discretion of the supe-

rior court. *Wachovia Bank & Trust Co. v. Waddell*, 234 N. C. 454, 67 S. E. (2d) 651 (1951).

Necessary and Proper Parties.— An action to compel the executors to account may be instituted by a legatee or heir. Executors are jointly liable for maladministration. They are necessary parties. All others interested in the settlement of the estate—creditors of the testator, as well as his legatees and other beneficiaries of the estate—are at least proper parties and in some instances may be necessary parties. *Davis v. Davis*, 246 N. C. 307, 98 S. E. (2d) 318 (1957).

Actions to surcharge and falsify the accounts of administrators may be instituted by creditors, or by legatees, or by distributees. Where the action is for maladministration of the estate of an intestate, the administrator and the sureties on his bond are necessary and proper parties. *Kearns v. Primm*, 263 N.C. 423, 139 S.E.2d 697 (1965).

This section is not confined to actions pertaining to, etc.—

In accord with original. See *Rudisill v. Hoyle*, 254 N. C. 33, 118 S. E. (2d) 145 (1961).

Setting Aside Order Discharging Personal Representative. — Where it is made to appear that the administrator c.t.a. has funds in his hands belonging to the estate, a prior order of the clerk discharging the personal representative may be set aside by motion in the cause, and an action asserting a claim, which if established would constitute a debt of the estate, may be treated as such motion. *Mitchell v. Downs*, 252 N. C. 430, 113 S. E. (2d) 892 (1960).

ARTICLE 17.

Distribution.

§§ 28-149 to 28-152: Repealed by Sessions Laws 1959, c. 879, ss. 1, 14, effective July 1, 1960.

Cross References. — For present provisions as to order of distribution in cases of intestacy, advancements and next of kin of illegitimate, see §§ 29-1 to 29-29. See Editor's Note under § 29-1.

Editor's Note. — The provisions of repealed § 28-149 were derived from the following statutory provisions: R. S., c. 64, s. 9; R. C., c. 64, s. 1; 1868-9, c. 113, s. 53; Code, s. 1478; 1893, c. 82; Rev., s. 132; 1913, c. 166; 1915, c. 37; C. S., ss. 7, 137; 1921, c. 54; 1927, c. 231; 1945, c. 46; 1947.

c. 879; 1951, c. 1078, s. 1; 1953, cc. 1101, 1325; 1955, c. 540, s. 1; c. 813, ss. 1, 2.

The provisions of repealed § 28-150 were derived from the following statutory provisions: 1868-9, c. 113, s. 54; Code, s. 1483; Rev., s. 133; C. S., s. 138.

The provisions of repealed § 28-151 were derived from the following statutory provisions: 1868-9, c. 113, ss. 55, 56; Code, ss. 1484, 1485; Rev., ss. 134, 135; C. S., s. 139.

The provisions of repealed § 28-152 were

derived from the following statutory provisions: 1868-9, c. 113, ss. 57, 58; Code, ss.

1486, 1487; Rev., ss. 136, 137; C. S., s. 140; 1955, c. 542, s. 1.

§ 28-154. Allotment to after-born child in personal property.

After-Born Child of Intestate Shares in Estate.—This statutory provision clearly assumes and contemplates that an after-born child of an intestate shares in the estate, both real and personal, of such intestate. *Byerly v. Tolbert*, 250 N. C. 27, 108 S. E. (2d) 29 (1959).

Child Born to Intestate's Widow More Than 280 Days after His Death.—When it is asserted on behalf of a child born of the woman to whom the intestate was married and with whom he was living at the time of his death that the intestate was her father, the fact that such child was born more than ten lunar months or 280 days after the intestate's death, standing alone, does not preclude the child as a matter of law from receiving a child's share in the distribution of the intestate's personal estate, absent a statute so pro-

viding. Whether such child is the child of intestate is determinable as an issue of fact. *Byerly v. Tolbert*, 250 N. C. 27, 108 S. E. (2d) 29 (1959).

If, under all relevant circumstances, a child is born more than ten lunar months or 280 days after the death of the intestate, the presumption is that the child was not en ventre sa mere when the intestate died. In the absence of evidence to the contrary, this presumption is determinative but this presumption may be rebutted by evidence tending to show that intestate was in fact the father of the child. Thus, when the issue is raised, the burden of proof rests upon such child to establish by the greater weight of the evidence that the intestate was the father. *Byerly v. Tolbert*, 250 N. C. 27, 108 S. E. (2d) 29 (1959).

§ 28-158. Before settlement executor may have claimants' shares in estate ascertained.

Cited in *Sheppard v. Kennedy*, 242 N. C. 529, 88 S. E. (2d) 760 (1955).

§ 28-158.1. Distribution of assets in kind in satisfaction of bequests and transfers in trust for surviving spouse.—Whenever under any will or trust indenture the executor, trustee or other fiduciary is required to, or has an option to, satisfy a bequest or transfer in trust to or for the benefit of the surviving spouse of a decedent by a transfer of assets of the estate or trust in kind at the values as finally determined for federal estate tax purposes, the executor, trustee or other fiduciary shall, in the absence of contrary provisions in such will or trust indenture, be required to satisfy such bequest or transfer by the distribution of assets fairly representative of the appreciation or depreciation in the value of all property available for distribution in satisfaction of such bequest or transfer. (1965, c. 764, s. 1.)

Editor's Note.—Section 1½ of c. 764, Session Laws 1965, provides that the provisions of this section shall apply to wills probated and trust indentures created after June 1, 1965.

§ 28-158.2. Agreements with taxing authorities to secure benefit of federal marital deduction.—The executor, trustee, or other fiduciary having discretionary powers under a will or trust indenture with respect to the selection of assets to be distributed in satisfaction of a bequest or transfer in trust to or for the benefit of the surviving spouse of a decedent shall be authorized to enter into agreements with the Commissioner of Internal Revenue of the United States of America, and other taxing authorities, requiring the fiduciary to exercise the fiduciary's discretion so that cash and other properties distributed in satisfaction of such bequest or transfer in trust will be fairly representative of the net appreciation or depreciation in value on the date, or dates, of distribution of all property then available for distribution in satisfaction of such bequest or transfer in trust. Any such fiduciary shall be authorized to enter into any other agreement not in conflict with the express terms of the will or trust indenture that may be necessary or advisable in order to secure for federal estate tax purposes the appropriate marital deduction available under the Internal Revenue Laws of the United States of America and to do and perform all acts incident to such purpose. (1965, c. 744.)

§ 28-160. Payment to clerk after one year discharges representative pro tanto.

Cited in *In re Estate of Perry*, 256 N. C. 65, 123 S. E. (2d) 99 (1961).

§ 28-160.1. Special proceeding against unknown heirs or next of kin of decedent before distribution of estate. If there may be other heirs or next of kin, born or unborn, of the decedent, other than those known to the executor or administrator and whose names and residences are unknown, before distributing such estate the executor or administrator is authorized to institute a special proceeding before the clerk making all unknown heirs or next of kin of said decedent parties thereto and such unknown heirs or next of kin shall be served with summons by publication as provided by law for the service of summons by publication in the superior court but as a condition precedent to the issuance of the order of publication, the executor or administrator shall not be required to make affidavit to the effect that there are such unknown heirs or next of kin or that he believes that there are such persons, but only that there may be. Upon such service being had, the court shall appoint some discreet person to act as guardian ad litem for said unknown heirs or next of kin and summons shall issue as to such guardian ad litem. Said guardian ad litem shall file answer upon behalf of said unknown heirs or next of kin and he may be paid for his services such sum as the court may fix, to be paid as other costs out of the estate. Upon the filing of the answer by said guardian ad litem all such unknown heirs and next of kin shall be before the court for the purposes of the proceeding to the same extent as if each had been served with summons by name, and any judgment entered by the court in such proceeding shall be as binding upon said unknown heirs or next of kin as if they were personally before the court and any payment or distribution made by the executor or administrator under orders of the court shall have the effect of fully discharging such executor or administrator and any sureties on his official bond to the full extent of such payment or distribution as ordered. (1957 c. 1248)

The purpose of giving notice by publication is not only to alert the individuals named, but also their friends and acquaintances who may see the publication and give them actual notice. *Bank of Wadesboro v. Jordan*, 252 N. C. 419, 114 S. E. (2d) 82 (1960).

Strict Compliance Required.—Service by publication is in derogation of the common law and strict compliance is required. *Bank of Wadesboro v. Jordan*, 252 N. C. 419, 114 S. E. (2d) 82 (1960).

Sufficiency of Notice.—Notice merely to

known and unknown heirs is insufficient if more definite identification is available. *Bank of Wadesboro v. Jordan*, 252 N. C. 419, 114 S. E. (2d) 82 (1960).

Next of kin have a right to be heard before the court decrees they are precluded from sharing in the estate of their next of kin who dies intestate, and are entitled to such notice of the hearing as the law provides, which may be by proper publication in the event personal service cannot be had. *Bank of Wadesboro v. Jordan*, 252 N. C. 419, 114 S. E. (2d) 82 (1960).

§ 28-161. On payment clerk to sign receipt.

Cited in *In re Estate of Perry*, 256 N. C. 65, 123 S. E. (2d) 99 (1961).

ARTICLE 18.

Settlement.

§ 28-162. Representative must settle after two years.

Representative May Terminate Administration before Expiration of Two years.—An executrix had a legal right to terminate administration of estate without waiting for the expiration of two years from her qualification as executrix. Dar-

den v. Boyette, 247 N. C. 26, 100 S. E. (2d) 359 (1957).

Legatee Seeking to Recover Legacy Must First Surcharge Final Account.—When an executor has filed his final account which omits a legacy, the legatee

must, in an action to recover it from the executor, first surcharge his final account. *Davis v. Singleton*, 259 N. C. 148, 130 S. E. (2d) 10 (1963).

Stated in *Allen v. Currie*, 254 N. C. 636, 119 S. E. (2d) 917 (1961).

§ 28-164. Retention of funds to satisfy claims not due or in litigation.

No Allowance for Contingent Liability.—The correct case citation in the note appearing under the catchline in the re-

compiled volume is *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800 (1892).

§ 28-165. After final account representative may petition for settlement.

Judgment as to Personality Advancements Not Bar to Proceedings to Determine Realty Advancements.—Petition was filed by the administrator under this section for direction in the distribution of the surplus of personality in view of advancements made by intestate to the heirs and distributees either in money, or land, or both. Judgment was entered that intestate had advanced money in a certain sum to certain of the distributees and directed the administrator to disburse the personality after adjustment for such advances, with further provision that the order was made without prejudice to the interests of the heirs at law in the realty. There was no allegation

that any heir had been advanced realty over and above the share of realty which might come to the other heirs. It was held that the question of advancements of realty was neither presented nor could it have been properly determined in the administrator's proceeding for direction in the distribution of the personality, and therefore it does not bar a subsequent proceeding by some of the heirs to charge others in the partition of the lands of the estate with advancements in realty. *King v. Neese*, 233 N. C. 132, 63 S. E. (2d) 123 (1951).

Cited in *Johnson v. Salsbury*, 232 N. C. 432, 61 S. E. (2d) 327 (1950).

§ 28-166. Payment into court of fund due infant.—When any balance of money or other estate which is due an infant without guardian is found in the hands of an executor, administrator or collector who has filed his petition for settlement, the court or judge may direct such money or other estate to be paid into court, to be invested upon interest, or otherwise managed under the direction of the judge, for the use of such infant. (1868-9, c. 113, s. 97; Code, s. 1526; 1893, c. 317; Rev., s. 151; C. S., s. 153; 1965, c. 815, s. 3.)

Editor's Note. — The 1965 amendment eliminated "absent defendant or" preceding "infant" near the beginning of the section, substituted "filed" for "preferred"

near the middle of the section and eliminated "absent person or" preceding "infant" at the end of the section.

§ 28-167: Repealed by Session Laws 1965, c. 815, s. 4.

§ 28-170. Commissions allowed representatives; representatives guilty of misconduct or default.—Executors, administrators, testamentary trustees, collectors, or other personal representatives or fiduciaries shall be entitled to commissions to be fixed in the discretion of the clerk not to exceed five per cent upon the amount of receipts, including the value of all personality when received, and upon the expenditures made in accordance with law, which commissions shall be charged as a part of the costs of administration and, upon allowance, may be retained out of the assets of the estate against creditors and all other persons claiming an interest in the estate. Provided, however, when the gross value of an estate is two thousand dollars (\$2,000.00) or less, the clerk is authorized and empowered to fix the commission to be received by the executor, administrator, testamentary trustee, creditor or other personal representative in an amount as he, in his discretion, deems just and adequate. In determining the amount of such commissions, both upon personality received and upon expenditures made, the clerk shall consider the time, responsibility, trouble and skill involved in the management of the estate. Where land is sold to pay debts or legacies, the commission shall be computed only on the proceeds actually ap-

plied in the payment of debts or legacies. The clerk may make allowances on account of commissions on receipts of personalty and expenditures at any time during the course of the administration, but the total commissions allowed shall be determined on final settlement of the estate and shall not exceed the limit herein fixed. Nothing in this section shall prevent the clerk allowing reasonable sums for necessary charges and disbursements incurred in the management of the estate. Nothing in this section shall be construed to allow commissions on distribution of the shares of heirs, on distribution of the shares of distributees of personal property or on distribution of shares of legatees; and nothing herein contained shall be construed to abridge the right of any interested party to such administration to appeal from the clerk's order to the judge of the superior court. No executor, administrator, testamentary trustee, collector or other personal representative or fiduciary, who shall have been guilty of such default or misconduct in the due execution of his office as would justify revocation of his appointment under the provisions of G. S. 28-32, shall be entitled to any commission under the provisions of this section. For the purpose of computing commissions whenever any portion of the dividends, interest, rents or other amounts payable to an executor, administrator, trustee, collector or other personal representative or fiduciary is required by any law of the United States or other governmental unit to be withheld for income tax purposes by the person, corporation, organization or governmental unit paying the same, the amount so withheld shall be deemed to have been received and expended. (1868-9, c. 113, s. 95; 1869-70, c. 189; Code, s. 1524; Rev., s. 149; C. S., s. 157; 1941, c. 124; 1953, c. 855; 1959, c. 622; c. 879, s. 8; 1961, cc. 362, 575.)

Editor's Note.—

The 1953 amendment inserted the proviso following the first sentence.

The first 1959 amendment increased the amount in line nine from \$1,000.00 to \$2,000.00. The second 1959 amendment, effective July 1, 1960, struck out the words "on allotment of dower" which formerly appeared immediately following the word "commissions" in line twenty-three.

The first 1961 amendment added the next to last sentence. The second 1961 amendment added the last sentence.

Authority of Clerks of Court Where Representative Qualifies.—The clerk of the superior court where the personal representative qualifies has authority to fix the amount of fees to which an executor or administrator is entitled. *Strickland v. Jackson*, 259 N. C. 81, 130 S. E. (2d) 22 (1963).

Discretion of Clerk.—The allowance of commissions, by way of compensation, to an executor requires the exercise of judicial discretion and judgment by the clerk of the superior court. It is he who has original jurisdiction. If any interested party conceives that the allowance made by him is either inadequate or excessive, or is made under an erroneous conception of the law, he may appeal. But the Supreme Court, upon review of the compensation allowed, cannot perform the function of the clerk, for it has no original jurisdiction in such matters. *Wachovia*

Bank & Trust Co. v. Waddell, 237 N. C. 342, 75 S. E. (2d) 151 (1953).

Section Controls in Absence of Testamentary Provision.—In the absence of an effective testamentary provision on the subject, the right of the personal representative of a decedent to compensation is controlled by this section. *In re Ledbetter*, 235 N. C. 642, 70 S. E. (2d) 667 (1952).

A testator may stipulate in his will the compensation to be paid the person appointed executor with power to settle his estate. When this is done the provisions of the will are binding on all interested parties. But an executor has no right to fix and determine the compensation to be received by him. *Wachovia Bank & Trust Co. v. Waddell*, 237 N. C. 342, 75 S. E. (2d) 151 (1953).

Maximum Percentage Set by Will Controls.—Where the will does not fix or purport to fix the compensation to be paid testator's executor as compensation for services in settling his estate, but merely fixes the maximum percentage on receipts and disbursements at $2\frac{1}{2}\%$, it is the duty of the clerk to make an allowance to the executor subject to the maximum limitation stipulated in the will rather than the maximum fixed by this section. *Wachovia Bank & Trust Co. v. Waddell*, 237 N. C. 342, 75 S. E. (2d) 151 (1953).

The terms "receipts" and "expenditures," as used in this section, refer to the

actual receipts and the actual expenditures of the personal representative. An administrator has no lawful claim to commissions on the credits or offsets deducted by a consent judgment from the indebtedness of his testate. This is so for the reason that the deductions were neither actually received nor actually expended by the administrator. *In re Ledbetter*, 235 N. C. 642, 70 S. E. (2d) 667 (1952).

Section Does Not Affect Powers of

§ 28-170.1. Counsel fees allowable to attorneys serving as representatives.—The clerk, in his discretion, is authorized and empowered to allow counsel fees to an attorney serving as an executor, administrator, testamentary trustee, collector, or other personal representative or fiduciary (in addition to the commissions allowed him as such representative or fiduciary) where such attorney in behalf of the estate or trust he represents renders professional services, as an attorney, which are beyond the ordinary routine of administration and of a type which would reasonably justify the retention of legal counsel by any such representative or fiduciary not himself licensed to practice law. (1957, c. 375.)

ARTICLE 19.

Actions by and against Representative.

§ 28-172. Action survives to and against representative.

Editor's Note.—

For note on survival of actions for alienation of affections and criminal conversation, see 35 N. C. Law Rev. 428.

Section Changes Common Law.—

The rule of the common law that a personal right of action dies with the person has been changed by § 1-74 and this section. *Paschal v. Autry*, 256 N. C. 166, 123 S. E. (2d) 569 (1962).

This section clearly manifests a twofold legislative purpose: (1) To declare what causes of action survive the death of the person in whose favor or against whom they have accrued; and (2) to designate the persons who may sue or be sued upon such surviving causes of action. *McIntyre v. Josey*, 239 N. C. 109, 79 S. E. (2d) 202 (1953).

The collector of the estate of a deceased tort-feasor can be sued in his representative capacity upon a cause of action under this section. *McIntyre v. Josey*, 239 N. C. 109, 79 S. E. (2d) 202 (1953).

All Causes of Action Survive Except Those Specified in § 28-175 — It appears that under this section all causes of action survive the death of the person in whose favor or against whom they have accrued except the causes of action specified in G.S. 28-175. *McIntyre v. Josey*, 239 N. C. 109, 79 S. E. (2d) 202 (1953).

Cause of Action for Tortious Injury to Personal Property.—Since it is not one of

Clerk as to Fees of Commissioners.—This section does not divest the clerk of the superior court of the powers and duties expressly committed to him by the provisions of § 1-408 with respect to the fees of commissioners appointed for the sale of land as provided therein. *Welch v. Kearns*, 259 N. C. 367, 130 S. E. (2d) 634 (1963).

Applied in Welch v. Kearns, 261 N.C. 171, 134 S.E.2d 155 (1964).

the causes of action enumerated in G. S. 28-175, a cause of action for a tortious injury to personal property survives the death of either party. *McIntyre v. Josey*, 239 N. C. 109, 79 S. E. (2d) 202 (1953)

Generally Debt Due Decedent Can Be Collected Only by Administrator.—If a debt is due a decedent, it can be collected only by his administrator. *Spivey v. Godfrey*, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Since pending the administration of an estate title to personal property of an intestate vests in his administrator and not his next of kin, it necessarily follows that the administrator, and not creditors or next of kin, is the proper party to bring an action to collect a debt due the estate or to recover specific personal property. *Spivey v. Godfrey*, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Bank Deposit Vests in Personal Representative.—Where a bank was obligated in an unstated amount to its depositor, when he died, the relationship theretofore subsisting was that of debtor and creditor, and the title to said account vested in the depositor's personal representative for collection and administration. *Monroe v. Dietenhoffer*, 264 N.C. 538, 142 S.E.2d 135 (1965).

To the general rule that the administrator must bring suit there are certain exceptions. If the administrator has re-

fused to bring the action to collect the assets; if there is collusion between a debtor and a personal representative—particularly if the latter is insolvent; or, if some other peculiar circumstance warrants it, the creditors or next of kin may bring the action which the personal representative should have brought. However, in such a case the administrator must be a party defendant. *Spivey v. Godfrey*, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Suit by Next of Kin to Collect His Share of Decedent's Funds in Hands of Third Party.—A suit by one of the next of kin to collect his share of decedent's funds in the hands of a third person is no different from a suit by a creditor of the estate to collect a debt due it. In the absence of allegations bringing the suit within one of the exceptions, this has never been permitted. *Spivey v. Godfrey*, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Without alleging that the administrator has refused to bring suit or that there was collusion, one of six next of kin of an intestate, by making his administrator a party defendant, may not maintain an action against another of the next of kin for his distributive share of decedent's money which that other is wrongfully

withholding. *Spivey v. Godfrey*, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Removal of Personal Representative for Failure to Prosecute or Defend Action.—In a proper case, a personal representative may be removed for failure to prosecute or defend actions in behalf of the estate he represents, but clearly a request to sue and a refusal would be conditions precedent. *Spivey v. Godfrey*, 258 N. C. 676, 129 S. E. (2d) 253 (1963).

Action for Wrongful Cutting and Removal of Timber.—If a cause of action for damages for the wrongful cutting and removal of timber from realty belonging to the deceased, in whole or in part, accrued during his lifetime, the action for damages survives to his executors, and must be brought by his executors rather than by his heirs or devisees. However, if such an injury to the realty was committed after his death, the right of action belongs to his heirs or devisees. *Paschal v. Autry*, 256 N. C. 166, 123 S. E. (2d) 569 (1962).

Applied in *Inman v. Mears*, 247 N. C. 661, 101 S. E. (2d) 692 (1958).

Cited in *Clark v. Lambreth* 235 N. C. 578, 70 S. E. (2d) 828 (1952); *Ewing v. Caldwell*, 243 N. C. 18, 89 S. E. (2d) 774 (1955); *Mozingo v. Consolidated Constr. Co.*, 171 F. Supp. 396 (1959).

§ 28-173. Death by wrongful act; recovery not assets; dying declarations.—When the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages theretofore, the person or corporation that would have been so liable, and his or their executors, administrators, collectors or successors shall be liable to an action for damages, to be brought by the executor, administrator or collector of the decedent; and this notwithstanding the death, and although the wrongful act, neglect or default, causing the death, amounts in law to a felony. The amount recovered in such action is not liable to be applied as assets, in the payment of debts or legacies, except as to burial expenses of the deceased, and reasonable hospital and medical expenses not exceeding five hundred dollars (\$500.00) incident to the injury resulting in death; provided that all claims filed for such services shall be approved by the clerk of the superior court and any party adversely affected by any decision of said clerk as to said claim may appeal to the superior court in term time, but shall be disposed of as provided in the Intestate Succession Act.

In all actions brought under this section the dying declarations of the deceased as to the cause of his death shall be admissible in evidence in like manner and under the same rules as dying declarations of the deceased in criminal actions for homicide are now received in evidence. (R. C., c. 46, ss. 8, 9; 1868-9, c. 113, ss. 70, 72, 115, Code, ss. 1498, 1500; Rev., s. 59; 1919, c. 29; C. S., s. 160; 1933, c. 113; 1951, c. 246, s. 1; 1959, c. 879, s. 9; c. 1136.)

I. IN GENERAL.

Editor's Note.—The 1951 amendment struck out the words "within one year after such death" formerly appearing

after the word "brought" in line five.

The first 1959 amendment, effective July 1, 1960, inserted "the Intestate Succession Act" in lieu of "this chapter for

the distribution of personal property in case of intestacy" which formerly appeared at the end of the first paragraph.

The second 1959 amendment inserted, beginning with the words "and reasonable" in line nine and ending with the words "term time" in line fourteen.

For note on possibility of recovery for wrongful death of unborn child, see 28 N. C. Law Rev. 245. As to necessity for alleging that action for wrongful death was instituted within one year, see 28 N. C. Law Rev. 334. For note on action for death based upon breach of warranty of fitness in sale of drug, see 30 N. C. Law Rev. 478.

Section Creates New Cause of Action.—

In North Carolina the action for wrongful death exists only by virtue of this and the following section. *In re Ives' Estate*, 248 N. C. 176, 102 S. E. (2d) 807 (1958).

The right of action for wrongful death is purely statutory. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

In North Carolina a right of action to recover damages for wrongful death is given by this section and § 28-174, and in this jurisdiction the action for wrongful death exists only by virtue of these statutes. *In re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

No Such Right Existed at Common Law.—

In accord with 1st paragraph in original. See *Bryant v. Atlantic Coast Line R. Co.*, 248 N. C. 43, 102 S. E. (2d) 393 (1958).

No right of recovery for death by wrongful act existed at common law. *Colyar v. Atlantic States Motor Lines*, 231 N. C. 318, 56 S. E. (2d) 647 (1949).

Right of Action a Property Right.—

In accord with original. See *In re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

What Constitutes a Cause of Action.—

In accord with 2nd paragraph in original. See *Rogers v. Green*, 252 N. C. 214, 113 S. E. (2d) 364 (1960).

Right Must Be Asserted, etc.—

In accord with original. See *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N. C. 55, 89 S. E. (2d) 788 (1955).

Authority to Compromise. — Ordinarily, an executor or administrator has the right to compromise any disputed or doubtful claim of his decedent provided he acts honestly and exercises the care of an ordinarily prudent person. And this rule is applicable to a purely statutory cause of action for wrongful death. *McGill v. Bison Fast Freight, Inc.*, 245 N. C. 469, 98 S. E. (2d) 438 (1957).

Action against Physician Barred by Settlement with Original Tort-Feasors. — Where a plaintiff institutes an action to recover damages for the wrongful death of his intestate against persons alleged to be solely responsible for intestate's injuries and death, and thereafter the action is compromised by the entry of a consent judgment for a substantial sum, the judgment is a bar to the plaintiff's right to maintain a subsequent action for the wrongful death of his intestate against a physician or surgeon for negligent treatment of the original injuries, such treatment being known to plaintiff when the first suit was filed. *Bell v. Hankins*, 249 N. C. 199, 105 S. E. (2d) 642 (1958).

Action in Federal Court in Virginia. — A North Carolina administrator, not qualified in Virginia, was held unable to maintain an action in a federal district court in Virginia under either the North Carolina or Virginia death by wrongful act statutes. *Mozingo v. Consolidated Constr. Co.*, 171 F. Supp. 396 (1959).

Applied in Graham v. Atlantic Coast Line R. Co., 240 N. C. 338, 82 S. E. (2d) 346 (1954); *Barnes v. Caulbourne*, 240 N. C. 721, 83 S. E. (2d) 898 (1954); *Little v. Power Brake Co., Inc.*, 255 N. C. 451, 121 S. E. (2d) 889 (1961); *Hines v. Frink*, 257 N. C. 723, 127 S. E. (2d) 509 (1962); *Hardbarger v. Deal*, 258 N. C. 31, 127 S. E. (2d) 771 (1962); *Stegall v. Catawba Oil Co.*, 260 N.C. 459, 133 S.E.2d 138 (1963); *Davis v. Parnell*, 260 N.C. 522, 133 S.E.2d 169 (1963); *Keller v. Security Mills of Greensboro, Inc.*, 260 N.C. 571, 133 S.E.2d 222 (1963); *Rosser v. Smith*, 260 N.C. 647, 133 S.E.2d 499 (1963); *Scott v. Clark*, 261 N.C. 102, 134 S.E.2d 181 (1964); *Burkey v. Kornegay*, 261 N.C. 513, 135 S.E.2d 204 (1964); *Scarlett v. Abernethy*, 261 N.C. 514, 135 S.E.2d 212 (1964); *Dove v. Lawson*, 261 N.C. 516, 135 S.E.2d 216 (1964); *Harrington v. Nance*, 261 N.C. 654, 135 S.E.2d 661 (1964); *Loomis v. Torrence*, 261 N.C. 741, 135 S.E.2d 785 (1964); *Bullock v. McFerran*, 261 N.C. 742, 136 S.E.2d 84 (1964); *Forgy v. Schwartz*, 262 N.C. 185, 136 S.E.2d 668 (1964); *Thomas v. Morgan*, 262 N.C. 292, 136 S.E.2d 700 (1964); *Badger v. Medley*, 262 N.C. 742, 138 S.E.2d 401 (1964); *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965); *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Cited in In re Will of Winborne, 231 N. C. 463, 57 S. E. (2d) 795 (1950); *Caldwell v. Abernethy*, 231 N. C. 692, 58 S. E. (2d) 763 (1950); *Call v. Stroud*, 232 N. C. 478, 61 S. E. (2d) 342 (1950); *United States v. Brooks*, 176 F. (2d) 482 (1949); *McHar-*

ney v. Wooten, 234 N. C. 110, 66 S. E. (2d) 692 (1951); Snowden v. Wooten, 234 N. C. 111, 66 S. E. (2d) 693 (1951); Read v. Young Roofing Co., 234 N. C. 273, 66 S. E. (2d) 821 (1951); Clark v. Lambreth, 235 N. C. 578, 70 S. E. (2d) 828 (1952); Competitor Liaison Bureau of Nascar, Inc. v. Midkiff, 246 N. C. 409, 98 S. E. (2d) 468 (1957); Armentrout v. Hughes, 247 N. C. 631, 101 S. E. (2d) 793 (1958); Lawson v. North Carolina State Highway & Public Works Comm., 248 N. C. 276, 103 S. E. (2d) 366 (1958); Byerly v. Tolbert, 250 N. C. 27, 108 S. E. (2d) 29 (1959).

II. LIMITATION OF THE ACTION.

Action Is Now Subject to Two-Year Statute of Limitations in § 1-53.—Up to the time of the amendments of 1951 to this section and § 1-53, it had consistently been held that the time limitation in this section was not a statute of limitations, but rather a condition precedent to maintenance of an action. The effect of the amendments was to remove from the Wrongful Death Act the time limitation and make the act subject to the statute of limitations of two years in § 1-53. McCrater v. Stone & Webster Engineering Corp., 248 N. C. 707, 104 S. E. (2d) 858 (1958).

Prior to the enactment of § 1-53 (4), and the 1951 amendment to this section, the institution of an action for wrongful death within one year after such death was a condition precedent to maintaining the action. All other requirements of the section were also strictly construed. The amendment removed the time limitation as a condition annexed to the cause of action and made it a two-year statute of limitation. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

And Time Is No Longer Integral Part of Right of Action.—Since the enactment of the 1951 amendment to this section, the time within which a wrongful death action may be commenced is not an integral part of the right of action or a condition precedent thereto but is an ordinary (two-year) statute of limitations under § 1-53 (4). Stamey v. Rutherfordton Electric Membership Corp., 249 N. C. 90, 105 S. E. (2d) 282 (1958).

Former Law. — Right of action for wrongful death is solely statutory and the former statutory requirement that the action be instituted within one year from the date of such death was a condition annexed to the right of action and not a limitation. Colyar v. Atlantic States Mo-

tor Lines, 231 N. C. 318, 56 S. E. (2d) 647 (1949).

Under this section as it stood before the 1951 amendment, the plaintiff in an action for wrongful death was not required to allege in the complaint that the action was brought within one year from the date of death, but was required to show compliance with this statutory condition by proof upon the trial. And in so far as the holding in Wilson v. Chastain, 230 N. C. 390, 53 S. E. (2d) 290 (1949) was in conflict with this decision it was modified. Colyar v. Altantic States Motor Lines, 231 N. C. 318, 56 S. E. (2d) 647 (1949).

Amendment Not Introducing New Cause of Action.—Where, in an action for wrongful death, the complaint discloses that the action was instituted within the statutory period, but plaintiff is thereafter permitted to amend the defective statement of his good cause of action by particularizing the acts of negligence complained of, the amendment does not introduce a new cause of action, and the cause is not barred by this section. Davis v. Rhodes, 231 N. C. 71, 56 S. E. (2d) 43 (1949).

Delay Less Than Period Is Not Laches of Itself.—Mere delay of petitioner in commencing his action for damages for wrongful death, which does not amount to a bar of the statute of limitations, does not of itself constitute laches, where the delay has not worked an injury or prejudice or disadvantage to the administratrix c.t.a. of the estate, and the clerk has found no facts that petitioner's delay would work prejudice or injury to the estate of the deceased. In re Miles' Estate, 262 N.C. 647, 138 S.E.2d 487 (1964).

III. PARTIES TO THE ACTION.

Suit Must Be Brought by Personal Representative.—

Under this section, the only person who can sue is the personal representative of the deceased. Journigan v. Little River Ice Co., 233 N. C. 180, 63 S. E. (2d) 183 (1951); Mozingo v. Consolidated Constr. Co., 171 F. Supp. 396 (1959).

Action for wrongful death may be brought only by the executor, administrator, or collector of the decedent. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

In His Official Capacity.—

A widow, as such, has no right of action for the death of her husband. Graves v. Welborn, 260 N.C. 688, 133 S.E.2d 761 (1963).

Action by One Not Personal Representative Should Be Dismissed.—If an action for wrongful death is instituted by one

other than the personal representative of a decedent, duly appointed in this State, it should be dismissed, and a separate and independent action instituted by such representative. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

And Court Has No Authority to Convert It to New Action by Admission of Party.—The court has no authority, over objection, to convert a pending action for wrongful death which cannot be maintained into a new and independent action by admitting a party who is solely interested as plaintiff. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

If Joinder of Personal Representative Is Permitted, Action Only Commenced Then.—Should the personal representative be permitted to become a party to an unauthorized action for wrongful death, the action is deemed to have been commenced only from the time he became a party. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

The real party in interest, etc.—

In accord with original. See *In re Ives' Estate*, 248 N.C. 176, 102 S.E. (2d) 807 (1958).

Necessity for Proof Where Plaintiff's Capacity Denied.—Nonsuit is properly entered in an action for wrongful death when plaintiff's allegation that she was duly qualified and acting administratrix of the deceased is denied in the answer and plaintiff offers no evidence in support of her allegation. *Carr v. Lee*, 249 N.C. 712, 107 S.E. (2d) 544 (1959).

False Allegation of Appointment Cannot Be Validated by Subsequent Appointment.—One who has never applied for letters of administration or who, having applied, has no reasonable grounds for believing that he had been duly appointed, cannot institute an action for wrongful death, or any other cause, upon a false allegation of appointment and thereafter validate that allegation by a subsequent appointment. *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963).

Foreign Administrator Cannot Sue.—

In an action brought to recover for a wrongful death which occurred in this State, no one except an executor, administrator or collector qualified in North Carolina has a right to bring such an action in North Carolina. *King v. Cooper Motor Lines, Inc.*, 142 F. Supp. 405 (1956).

Action by Administrator of Child, etc.—

In accord with original. See *Lewis v. Farm Bureau Mut. Auto. Ins. Co.*, 243 N.C. 55, 89 S.E. (2d) 788 (1955).

The administrator of an unemancipated

minor child killed by the negligence of his parent has no cause of action against the parent for the wrongful death of his intestate. *Capps v. Smith*, 263 N.C. 120, 139 S.E.2d 19 (1964).

Action by Administrator of Wife against Husband.—If a husband's negligence results in the death of his wife, her personal representative may maintain an action against him for her wrongful death. *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

Action against Estate, etc.—

By the specific language of this section, when the death of a person is caused by a wrongful act, neglect or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, and the person that would have been so liable dies, or is killed at the same time, then the action for damages for wrongful death survives the death of the tort-feasor against his executor or administrator. *In re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Right to Have Discharge of Tort-Feasor's Administratrix Set Aside.—An administrator who institutes action for the wrongful death of his intestate within the statutory time against the estate of the deceased tort-feasor is entitled to have the order of the clerk discharging the administratrix of the deceased tort-feasor set aside by motion in the cause upon showing a policy of liability insurance in the hands of the administratrix of the deceased tort-feasor available for the payment of the claim. *In re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Joinder of Joint Tort-Feasor as Party Defendant.—

The principle applied in *Wilson v. Massegee*, 224 N.C. 705, 32 S.E. (2d) 335 (1944), was held to be the same, and the court adhered to its decision therein, in *Bryant v. Atlantic Coast Line R. Co.*, 248 N.C. 43, 102 S.E. (2d) 393 (1958), involving a suit under the Federal Employers' Liability Act against defendant railroad, in which plaintiff was not permitted to join in additional defendant tort-feasor since there was no common legal right in the actions against the two.

IV. DISTRIBUTION OF RECOVERY.

Recovery Held in Trust.—

In accord with original. See *In re Ives' Estate*, 248 N.C. 176, 102 S.E. (2d) 807 (1958).

Recovery Not Assets, etc.—

The right of action for wrongful death, being conferred by statute at death, never

belonged to the deceased, and the recovery is not assets in the usual acceptation of the term. *Lamm v. Lorbacher*, 235 N. C. 728, 71 S. E. (2d) 49 (1952); *In re Ives' Estate*, 248 N. C. 176, 102 S. E. (2d) 807 (1958).

Statutory Beneficiary Not Entitled to Share in Recovery for Death Caused by His Negligence.—In cases instituted to recover damages for wrongful death, no beneficiary under the statute for whom recovery is sought will be permitted to enrich himself by his own wrong. The right of a person otherwise entitled to receive the money paid for wrongful death, or to share in the distribution of such a sum paid, will be denied where the death of the decedent was caused by such person's negligence. *In re Ives' Estate*, 248 N. C. 176, 102 S. E. (2d) 807 (1958).

Intestate was killed in a collision while riding as a passenger in an automobile owned and driven by her son. Intestate's administrator and the son's insurer effected a settlement whereby the insurer paid the administrator a sum of money in consideration of the release by the administrator of all claims and demands against the son and the insurer arising out of the accident. There was no finding of fact that the son was negligent, or that he knew of the settlement, and the release stated that all parties released denied liability; however, the son, although he alleged in his answer that he was not negligent and

§ 28-174. Damages recoverable

Editor's Note. — As to admissibility of evidence relating to damages recoverable for wrongful death, see 28 N. C. Law Rev. 106.

No "Hard and Fast Rule" Prescribed.—

In accord with original. See *Bryant v. Woodlief*, 252 N. C. 488, 114 S. E. (2d) 241 (1960).

The action for wrongful death exists only by virtue of this and the preceding section, and the statutory provision must govern not only the right of action but also the rule for determining the basis and extent of recovery of damages therefor. *Lamm v. Lorbacher*, 235 N. C. 728, 71 S. E. (2d) 49 (1952).

In North Carolina a right of action to recover damages for wrongful death is given by this section and § 28-173, and in this jurisdiction the action for wrongful death exists only by virtue of these statutes. *In re Miles' Estate*, 262 N.C. 647, 138 S.E.2d 487 (1964).

Only Right to Compensation for Pecuniary Loss Conferred.—This section leaves no room for sentiment. It confers a right

that the accident was caused solely by the negligence of the driver of the other automobile, did not allege that he had brought suit or made any claim or demand against such driver for damage to his automobile, and offered no evidence at the hearing. It was held that public policy would not permit the son to share in the amount paid in settlement by his insurer. *In re Ives' Estate*, 248 N. C. 176, 102 S. E. (2d) 807 (1958).

Formerly, Payment of Hospital and Medical Expenses Was Unauthorized.—There was no provision in this section for payment of hospital and medical expenses out of a recovery until the section was amended by Session Laws 1959, c. 1136. *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Now Such Payment Is Limited by This Section.—This section, as amended in 1959 authorizes payment for hospital and medical expenses not exceeding \$500.00. Therefore, in a case where an action has been brought for wrongful death and the jury has awarded an amount for such death, the limitation fixed in the statute for payment of hospital and medical expenses would control. *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Allocation of Funds Received in Single Settlement for Wrongful Death and for Suffering Prior to Death.—See *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

for death by wrongful act.

to compensation only for pecuniary loss. *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

But exemplary or punitive damages are not recoverable, etc.—

In accord with original. See *Armentrout v. Hughes*, 247 N. C. 631, 101 S. E. (2d) 793 (1958).

This section does not provide for assessment of punitive damages nor the allowance of nominal damages in the absence of pecuniary loss. *Hines v. Frink*, 257 N. C. 723, 127 S. E. (2d) 509 (1962); *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

No damages are to be allowed as a solatium, etc.—

This section does not contemplate solatium for the plaintiff, nor punishment for the defendant. It is therefore in the nature of pecuniary demand, the only question being: How much has the plaintiff lost by the death of the person injured? *Armentrout v. Hughes*, 247 N. C. 631, 101 S. E. (2d) 793 (1958).

Nominal damages, entitling plaintiff to

costs, are not recoverable under this section, in the absence of pecuniary loss in which recovery could be based. *Armentrout v. Hughes*, 247 N. C. 631, 101 S. E. (2d) 793 (1958).

This section does not provide for the allowance of nominal damages in the absence of pecuniary loss. *Hines v. Frink*, 257 N. C. 723, 127 S. E. (2d) 509 (1962).

The burden of proof is upon plaintiff to show pecuniary loss to the estate on account of decedent's death. *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Recovery for Pain and Suffering, etc.—

In accord with original. See *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Where a person is injured by the negligence of another, lives for a period of time, and thereafter dies as a result of the injuries, his personal representative may recover (1) as an asset of the estate, damages sustained by the injured person during his lifetime, including hospital and medical expenses, and (2) for the benefit of the next of kin, the pecuniary injury resulting from death, the amounts recoverable being determinable upon separate issues. *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

Pecuniary Loss Suffered by Relative Is Measure.—

Under this section compensation for wrongful death is limited to "the pecuniary injury resulting from such death." This phrase has remained unchanged since the section was enacted in 1869. In view of this restrictive language, the consideration of the jury should be confined to determining the amount of money the decedent would have earned during the period the jury find he would otherwise have lived, and, then, after deducting the probable cost of his ordinary living expenses, to ascertaining the present worth of the accumulation of such net earnings as the pecuniary value of the life of the decedent to his estate. This rule, though sometimes difficult of application, applies to all alike. *Lamm v. Lorbacher*, 235 N. C. 728, 71 S. E. (2d) 49 (1952).

Net Present Pecuniary Worth of Deceased.—

See *United States v. Brooks*, 176 F. (2d) 482 (1949); *Lamm v. Lorbacher*, 235 N. C. 728, 71 S. E. (2d) 49 (1952); *Caudle v. Southern Ry. Co.*, 242 N. C. 466, 88 S. E. (2d) 138 (1955).

The present value of the net pecuniary worth of a deceased is the value of his net pecuniary worth in terms of a lump sum presently paid rather than when paid from

time to time during the deceased's life expectancy. *Caudle v. Southern Ry. Co.*, 242 N. C. 466, 88 S. E. (2d) 138 (1955).

The measure of damages is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income, based upon his life expectancy. *Bryant v. Woodlief*, 252 N. C. 488, 114 S. E. (2d) 241 (1960).

Probable Gross Income Less Probable Expenses.—

See *Journigan v. Little River Ice Co.*, 233 N. C. 180, 63 S. E. (2d) 183 (1951); *Caudle v. Southern Ry. Co.*, 242 N. C. 466, 88 S. E. (2d) 138 (1955).

In ascertaining damages for wrongful death the jury may take into consideration the age, health and expectancy of life of the deceased, his earning capacity, his habits, his ability and skill, the business in which he was employed and the means he had for earning money, the end of it all being to enable the jury fairly to arrive at the net income which the deceased might reasonably be expected to earn from his own exertions, had his death not ensued, and thus assess the pecuniary worth of the deceased to his family, had his life not been cut short by the wrongful act of the defendant. *Journigan v. Little River Ice Co.*, 233 N. C. 180, 63 S. E. (2d) 183 (1951); *United States v. Brooks*, 176 F. (2d) 482 (1949); *Lamm v. Lorbacher*, 235 N. C. 728, 71 S. E. (2d) 49 (1952). See *Caudle v. Southern Ry. Co.*, 242 N. C. 466, 88 S. E. (2d) 138 (1955).

Ascertainment of Necessary Living Expenses.— In an action for wrongful death, the jury, in ascertaining the probable cost of deceased's necessary living expenses during the period of his life expectancy, may take into consideration the deceased's age and manner of living. *Caudle v. Southern Ry. Co.*, 242 N. C. 466, 88 S. E. (2d) 138 (1955).

Ascertainment of Life Expectancy.— In an action for wrongful death, the jury in ascertaining the life expectancy of the deceased may take into consideration the mortuary tables, as evidence, along with other evidence as to his health, constitution, and habits. *Caudle v. Southern Ry. Co.*, 242 N. C. 466, 88 S. E. (2d) 138 (1955).

Wrongful Death of Child.—

In accord with 1st paragraph in original. See *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Where deceased was a mentally retarded boy of eleven shown by the evidence to be one who would continue to be a dependent

person rather than a person capable of earning a livelihood, no pecuniary loss was shown and an involuntary nonsuit should have been granted. *Scriven v. McDonald*, 264 N.C. 727, 142 S.E.2d 585 (1965).

Evidence of Retirement Income. — The retirement income which a deceased was receiving at the time of his death is properly shown in evidence on the question of damages in an action for wrongful death, since such retirement income is earned by an employee as the result of his previous labors, and evidence that the deceased was earning such income is alone sufficient basis for the admeasurement of damages. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. (2d) 241 (1960).

Evidence Held Competent in General. —

As a basis on which to enable the jury to make their estimate of damages, it is competent to show, and for them to consider, the age of the deceased, his prospects in life, his habits, his character, his industry and skill, the means he had for making money, the business in which he was employed—the end of it all being to enable the jury to fix upon the net income which might be reasonably expected if death had not ensued, and thus arrive at the pecuniary worth of the deceased to his family. You do not undertake to give the equivalent of human life. You allow nothing for suffering. You do not attempt to punish the defendant, but you seek to give a fair, rea-

sonable pecuniary worth of the deceased to his family. *Bryant v. Woodlief*, 252 N.C. 488, 114 S.E. (2d) 241 (1960).

Evidence Held Inadmissible. — In an action for wrongful death it is error to permit plaintiff administratrix to testify that intestate, who was her husband, had just come out of military service, as to the length of time he had been in the service, that they had a child two years old at the time of his death, and that she lost the home place to the mortgage people after his death, and that she paid his hospital and doctors' bills and burial expenses. *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E. (2d) 183 (1951).

Instructions as to Net Pecuniary Worth. — Failure of instructions to sufficiently explain to the jury that its award should be the present value of the net pecuniary worth over the period of life expectancy is prejudicial error. *Caudle v. Southern Ry. Co.*, 242 N.C. 466, 88 S.E. (2d) 138 (1955).

Applied in *Graham v. Atlantic Coast Line R. Co.*, 240 N.C. 338, 82 S.E. (2d) 346 (1954); *Burkey v. Kornegay*, 261 N.C. 513, 135 S.E.2d 204 (1964).

Cited in *Gray v. Carolina & N.W. Ry. Co.*, 243 N.C. 107, 89 S.E. (2d) 807 (1955); *In re Ives' Estate*, 248 N.C. 176, 102 S.E. (2d) 807 (1958); *Mozingo v. Consolidated Constr. Co.*, 171 F.Supp. 396 (1959).

§ 28-175. Actions which do not survive. — The following rights of action do not survive:

- (1) Causes of action for libel and for slander, except slander of title.
- (2) Causes of action for false imprisonment.
- (3) Causes where the relief sought could not be enjoyed, or granting it would be nugatory after death. (1868-9, c. 113, s. 64; Code, s. 1491; Rev., s. 157; 1915, c. 38; C.S., s. 162; 1965, c. 631.)

Editor's Note. —

The 1965 amendment deleted the words "and assault and battery" formerly appearing at the end of subdivision (2).

For note on libel by will, see 33 N.C. Law Rev. 146.

§ 28-176. To sue or defend in

There is no statutory authority for a foreign executor or administrator, etc.—

In accord with original. See *Brauff v. Commissioner of Revenue*, 251 N.C. 452, 111 S.E. (2d) 620 (1959).

This section is silent as to any distinction between a resident and a foreign personal representative. *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

Applied in *Neal v. Associates Discount Corp.*, 260 N.C. 771, 133 S.E.2d 699 (1963).

Cited in *Hardison v. Gregory*, 242 N.C. 324, 88 S.E. (2d) 96 (1955); *Paschal v. Autry*, 256 N.C. 166, 123 S.E. (2d) 569 (1962).

representative capacity.

Action against Nonresident Motorist's Personal Representative Is Authorized as Exception. — An action authorized by § 1-105, as amended in 1953 to allow service of process upon the executor or administrator of a nonresident motorist, is an exception to the general rule stated in *Cannon v. Cannon*, 228 N.C. 211, 45 S.E.2d 34 (1947). *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

ARTICLE 20.

*Representative's Powers, Duties and Liabilities.***§ 28-183. Representative may purchase for estate to prevent loss.**

Cited in *Davis v. Jenkins*, 236 N. C.
283, 72 S. E. (2d) 673 (1952).

§ 28-184.1. Exercise of powers of joint personal representatives by one or more than one.—(a) as used in this section, the term "personal representatives" includes executors, administrators, administrators c. t. a., administrators d. b. n., collectors, and testamentary trustees.

(b) If a will expressly makes provision for the execution of any of the powers of personal representatives by all of them or by any one or more of them, the provisions of the will govern.

(c) If there is no governing provision in the will, personal representatives may, by written agreement signed by all of them and filed with and approved by the clerk of superior court of the county in which such personal representatives qualified, provide that any one or more of the following powers of personal representatives may be exercised by any designated one or more of them:

- (1) Open bank accounts and draw checks thereon;
- (2) Subject to the provisions of G. S. 105-24, enter any safe-deposit box of the deceased or any safe-deposit box rented by the personal representative or representatives;
- (3) Employ attorneys and accountants;
- (4) List property for taxes and prepare and file State, municipal and county tax returns;
- (5) Collect claims and debts due the estate and give receipts therefor;
- (6) Pay claims against and debts of the estate;
- (7) Compromise claims in favor of or against the estate;
- (8) Have custody of property of the estate.

(d) The voting of corporate shares of stock is governed by the provisions of G. S. 55-69 (f).

(e) Subject to the provisions of subsections (b), (c) and (d) of this section, all other acts and duties must be performed by both of the personal representatives if there are two, and by a majority of them if there are more than two.

(f) No personal representative shall be relieved of liability on his bond or otherwise by entering into any agreement under this section. (1959, c. 1160.)

§ 28-186. Nonresident executor to appoint process agent.—A nonresident qualifying in the State as an executor shall at or before the time of his qualification appoint in writing a resident agent in the county of his qualification, on whom may be served citations, notices, and all processes required by law to be served on such executor. The executor shall file the appointment with the clerk in the county of his qualification. All citations, notices, and other processes served on such process agent shall be as effective as if served on the executor, but the return date shall not be sooner than ten days from the date of the issuance of the citation, notice, or process. No letters testamentary shall be granted to an executor until the appointment of the process agent has been filed with the clerk, and the clerk shall have properly recorded and indexed said appointment. (1917, c. 198, ss. 1, 2, 3; C. S., s. 174; 1955, c. 481.)

Editor's Note. — Prior to the 1955 amendment this section also applied to nonresident guardians.

Noncompliance as Ground for Removal. —The failure and refusal by a nonresident executrix to appoint a process agent as required by this section is sufficient ground under § 28-32 for her removal. *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957).

Applied in *Brauff v. Commissioner of Revenue*, 251 N. C. 452, 111 S. E. (2d) 620 (1959); *In re Marks' Estate*, 259 N. C. 332, 130 S. E. (2d) 678 (1963).

§ 28-187. Executor removing from State to appoint process agent. —When a resident executor removes from the State, he shall, before removing or within thirty days thereafter, appoint a process agent in the manner as provided in the case of a nonresident, and upon failure to make the appointment within thirty days, the clerk shall remove him and appoint an administrator with the will annexed. (1917, c. 198, s. 4; C. S., s. 175; 1955, c. 521.)

Editor's Note. — Prior to the 1955 amendment this section also applied to guardians.

§ 28-188. Nonresident's failure to obey process ground for removal. —The clerk may remove any nonresident executor who fails or refuses to obey any citation, notice or process served on the process agent appointed as provided in §§ 28-186, 28-187, and appoint a resident. (1917, c. 198, s. 5; C. S., s. 176; 1955, c. 470.)

Editor's Note. — The 1955 amendment deleted the words "or guardian" formerly appearing after the word "executor."

§ 28-190. Continuance of farming operations of deceased persons.

Quoted in *Poindexter v. First Nat. Bank*, 244 N. C. 191, 92 S. E. (2d) 773 (1956).

ARTICLE 22.

Estates of Missing Persons.

§§ 28-193 to 28-201: Repealed by Session Laws 1965, c. 815, s. 4.

Chapter 28A.

Estates of Missing Persons.

Sec.

- 28A-1. Death not presumed from seven years' absence; exposure to peril to be considered.
- 28A-2. Action for receiver; contents of complaint; parties.
- 28A-3. Procedure on complaint.
- 28A-4. Notice to interested persons.
- 28A-5. Service of notices.
- 28A-6. Procedure after notice.
- 28A-7. Property transferred to permanent receiver by order of judge; filing of inventory; recordation of order of transfer.
- 28A-8. Powers and duties of permanent receiver.
- 28A-9. Search for absentee.
- 28A-10. Claims against absentee.
- 28A-11. Final finding and decree.
- 28A-12. Termination of receivership.

Sec.

- 28A-13. Distribution of property of absentee.
- 28A-14. Additional limitations on accounting, distribution or making claim by absentee.
- 28A-15. When claim of absentee barred.
- 28A-16. Laws of administration of estates applicable.
- 28A-17. Appointment of public administrator as receiver for estate of less than one thousand dollars.
- 28A-18. Payment of insurance policies.
- 28A-19. Absentee insurance fund.
- 28A-20. Provisions applicable to person held incomunicado in foreign country.
- 28A-21. When agents' acts binding on estate of absentee.
- 28A-22. Provisions of chapter severable.

§ 28A-1. Death not presumed from seven years' absence; exposure to peril to be considered. —(a) Death Not to Be Presumed from Mere Absence.—In any action under this chapter, where the death of a person and the date thereof, or either, is in issue the fact that he has been absent from his place of residence, unheard of for seven years, or for any other period, creates no presumption

requiring the judge or the jury to find that he is now deceased. The issue shall be decided by the judge or jury as one of fact upon the evidence.

(b) Exposure to Specific Peril to Be Considered.—If during such absence the person has been exposed to a specific peril of death, this fact shall be considered by the judge; or if there be a jury, shall be sufficient evidence to be submitted to the jury. (1965, c. 815, s. 1.)

§ 28A-2. Action for receiver; contents of complaint; parties. — (a) Action for Receiver to Be Instituted in the Superior Court.—If any person having an interest in any property in this State disappears and is absent from his place of residence and after diligent inquiry his whereabouts remains unknown to those persons most likely to know the same, for a period of thirty days or more, or is a person in the military service of the United States who has been officially reported as missing in action, anyone who would be entitled to administer the estate of such absentee if he were deceased, or any interested person, may commence a civil action and file a duly verified complaint in the superior court of either the county of such absentee's domicile, or the county where any of his property is situated.

(b) Contents of the Complaint.—The complaint shall contain the following:

- (1) The name, age, occupation, and last known residence or address of such absentee;
- (2) The date and circumstances of his disappearance;
- (3) So far as known, a schedule of all his property within this State, including property in which he has an interest as tenant by the entirety, and other property in which he is co-owner with or without the right of survivorship;
- (4) The names and addresses of the persons who would have an interest in the estate of such absentee if he were deceased;
- (5) The names and addresses of all persons known to the complainant to claim an interest in the absentee's property; and
- (6) A prayer, that ancillary to the principal action, a receiver be appointed by virtue of the provisions of this chapter to take custody and control of such property of the absentee and to preserve and manage the same pending final disposition of the action as provided in G.S. 28A-11.

(c) Parties to the Action.—The absentee, all persons who would have an interest in the estate of such absentee if he were deceased, all persons known to claim an interest in the absentee's property, and all known insurers of the life of the absentee shall be made parties to the action. A guardian ad litem shall be appointed for the absentee, and shall file an answer in his behalf. (1965, c. 815, s. 1.)

§ 28A-3. Procedure on complaint. —Upon the filing of the complaint referred to in G.S. 28A-2, the judge may for cause shown appoint a temporary receiver to take charge of the property of the absentee to conserve it pending hearing on the complaint. Such temporary receiver shall qualify by giving bond in an amount and with surety approved by the judge and shall exercise only the powers specified by the judge. Within thirty days after the date of his appointment, he shall file an inventory of the property taken in charge. If a permanent receiver is appointed, the temporary receiver shall transfer and deliver to the permanent receiver all property in his custody and control, less such only as may be necessary to cover his expenses and compensation as allowed by the judge, and shall file his final account, and upon its approval be discharged. If the prayer for a permanent receiver is denied, the temporary receiver shall transfer and deliver to those entitled thereto all property in his custody and control less such only as may be necessary to cover his expenses and compensation as allowed by the judge, and shall file his final account, and upon its approval be discharged. If the prayer for a permanent receiver is denied the expenses and compensation of the temporary receiver may in the discretion of the judge be taxed as costs of the action to be paid by the complainant, but if the judge finds that the complaint was brought in good

faith and upon reasonable grounds, he may charge such costs against the property of the absentee. (1965, c. 815, s. 1.)

§ 28A-4. Notice to interested persons.—Upon the filing of the inventory by the temporary receiver, the judge shall issue a notice reciting the substance of the complaint and the appointment and action of the temporary receiver. This notice shall be addressed to such absentee, to all persons who would have an interest in the estate of such absentee if he were deceased, to all persons alleged in the complaint to claim an interest in the absentee's property, and to all whom it may concern. It shall direct them to file in the court within a time fixed by the judge a written statement of the nature and extent of the interest claimed in the property, and to appear at a time and place named and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the property under the provisions of this chapter. The return day of the notice shall be not less than thirty nor more than sixty days after its date unless otherwise ordered by the judge. (1965, c. 815, s. 1.)

§ 28A-5. Service of notices.—All notices required under this chapter shall be served on all parties to the action and on all other persons entitled to such notice in the manner now prescribed by G.S. 1-585 through G.S. 1-592, and in addition thereto the absentee shall be served by publication once in each of four successive weeks in one or more newspapers in the county where the proceeding is pending, and one copy shall be posted in a conspicuous place upon each parcel of land shown in the temporary receiver's inventory, and one copy shall be sent by registered or certified mail with return receipt requested to the last known address of such absentee. The judge may in his discretion cause other and further notice to be given within or without the county. (1965, c. 815, s. 1.)

§ 28A-6. Procedure after notice.—The absentee or any person entitled to notice as provided in G.S. 28A-4 may appear and show cause why a permanent receiver of the absentee's property should not be appointed to hold and dispose of the property under the provisions of this chapter. The judge may, after the hearing, either dismiss the complaint and order that the property in the custody and control of the temporary receiver be returned to the persons entitled thereto or he may make a finding that the absentee disappeared as of a stated date and appoint a permanent receiver of the absentee's property. (1965, c. 815, s. 1.)

§ 28A-7. Property transferred to permanent receiver by order of judge; filing of inventory; recordation of order of transfer.—Upon the permanent receiver giving bond as required by G.S. 28A-16 and its approval by the judge, the judge shall order the temporary receiver to transfer and deliver to the permanent receiver custody and control of the absentee's property, and the permanent receiver shall file with the court an inventory of the property received by him. A copy of this order as it affects any real property shall be issued by the judge and delivered to the permanent receiver who shall cause the same to be recorded in the office of the register of deeds of each county wherein such real property is situated. (1965, c. 815, s. 1.)

§ 28A-8. Powers and duties of permanent receiver.—The permanent receiver shall under the direction of the judge administer the absentee's property as an equity receivership with the following powers:

- (1) To take custody and control of all property of the absentee wherever situated,
- (2) To collect all debts due to the absentee and to pay all debts owed by him,
- (3) To bring and defend suits,
- (4) To pay insurance premiums,
- (5) With the approval of the judge in each instance, to continue to operate

and manage any business enterprise, farm or farming operations, and to make necessary contracts with reference thereto,

- (6) With the approval of the judge in each instance, to renew notes and other obligations, obtain loans on life insurance policies, and pledge or mortgage property for loans necessary in carrying on or liquidating the affairs of such absentee;
- (7) With the approval of the judge in each instance, to partition property owned by the absentee and another as joint tenants or tenants in common, with or without the right of survivorship; provided, in the case of property owned by the absentee and spouse as tenants by the entirety, such property may be partitioned only if the absentee's spouse consents in writing to the partitioning, and, in the event of partitioning, one half of the property or proceeds shall belong to the spouse and one half shall belong to the receiver as property of the absentee;
- (8) With the approval of the judge in each instance to sell, lease, invest and reinvest any or all property, its income, or its proceeds;
- (9) To pay over or apply the proceeds of loans and sales of such portion, or all of the property or the income thereof as may be necessary for the maintenance and support of the absentee's dependents; and if the income from the property of the absentee is not sufficient to pay all his debts and to provide for the maintenance and support of his dependents, the permanent receiver may apply to the judge for an order to sell or mortgage so much of the real or personal property as may be necessary therefor; each such sale or mortgage shall be reported to the judge, and if approved and confirmed by the judge, the receiver shall execute the required conveyances or mortgages of such property to the purchaser or lender upon his complying with the terms of sale or mortgage.

The judge may, in his discretion, by written order modify, add to or subtract from the statutory powers granted in this section. (1965, c. 815, s. 1.)

§ 28A-9. Search for absentee.—The judge shall by order direct the receiver to make a search for the absentee. The order shall specify the manner in which the search is to be conducted in order to insure that, in the light of the circumstances of the particular case, a diligent and reasonable effort be made to locate the absentee. The order may prescribe any methods of search deemed advisable by the judge, but must require, as a minimum, the following:

- (1) Inquiry of persons at the absentee's home, his last known residence, the place where he was last known to have been, and other places where information would likely be obtained or where the absentee would likely have gone;
- (2) Inquiry of relatives, friends and associates of the absentee, or other persons who should be most likely to hear from or of him;
- (3) Insertion of a notice in one or more appropriate papers, periodicals or other news media, requesting information from any person having knowledge of the absentee's whereabouts; and
- (4) Notification of local, state and national offices which should be most likely to know or learn of the absentee's whereabouts. (1965, c. 815, s. 1.)

§ 28A-10. Claims against absentee.—Immediately upon the appointment of a permanent receiver under this chapter, the permanent receiver shall publish a notice addressed to all persons having claims against the absentee informing them of the action taken and requiring them to file their claims under oath with the permanent receiver. If any claimant fails to file his sworn claim within six months from the date of the first publication of such notice, the receiver may plead this fact in bar of his claim. Such notice shall be published in the same manner as that now prescribed by statute

(G.S. 28-47) for claims against the estate of a decedent. Any party in interest may contest the validity of any claim before the judge, on due notice given to the permanent receiver and the person whose claim is contested. (1965, c. 815, s. 1.)

§ 28A-11. Final finding and decree.—(a) At any time, during the receivership proceedings, upon application to the judge by any party in interest and presentation of satisfactory evidence of the absentee's death, the judge may make a final finding and decree that the absentee is dead; in which event the decree and transcript of all of the receivership proceedings shall be certified to the clerk of the superior court for any administration as may be required by law upon the estate of a decedent, and the judge shall proceed no further except for the purposes hereinafter set forth in G.S. 28A-12, subdivisions (1) and (4); or

(b) At any time during the receivership proceedings, upon application to the judge by any party in interest and presentation of satisfactory evidence of the absentee's existence and whereabouts, except as provided in G.S. 28A-20, the judge may by decree revoke his finding that he is an absentee, and the judge shall proceed no further except for the purposes hereinafter set forth in G.S. 28A-12, subdivisions (2) and (4); or

(c) After the lapse of five years from the date of the finding of disappearance provided for in G.S. 28A-6, if the absentee has not appeared and no finding and decree have been made in accordance with the provisions of either subsections (a) or (b) above, and subject to the provisions of G.S. 28A-14, the judge may proceed to take further evidence and thereafter make a final finding of such absence and enter a decree declaring that all interest of the absentee in his property, including property in which he has an interest as tenant by the entirety and other property in which he is co-owner with or without the right of survivorship, subject to the provisions of § 28A-8 (7), has ceased and devolved upon others by reason of his failure to appear and make claim. (1965, c. 815, s. 1.)

§ 28A-12. Termination of receivership. — Upon the entry of any final finding and decree as provided in G.S. 28A-11, the judge shall proceed to wind up the receivership and terminate the proceedings:

- (1) In the case of a decree under G.S. 28A-11, subsection (a), that the absentee is dead:
 - a. By satisfying all outstanding expenses and costs of the receivership, and
 - b. By then deducting for the insurance fund provided in G.S. 28A-19 a sum equal to five per cent (5%) of the total value of the property remaining for distribution upon settlement of the absentee's estate, including amounts paid to the estate from policies of insurance on the absentee's life, and
 - c. By then certifying the proceedings to the clerk of the superior court subject to an order by the judge administering the receivership, or
- (2) In the case of a decree under G.S. 28A-11, subsection (b), revoking the finding that the missing person is an absentee:
 - a. By satisfying all outstanding expenses and costs of the receivership, and
 - b. By then returning his remaining property to him and rendering an accounting for that property not returned; or
- (3) In the case of a decree under G.S. 28A-11, subsection (c), declaring that all interest of the absentee in his property has ceased:
 - a. By satisfying all outstanding expenses and costs of the receivership, and
 - b. By then satisfying all outstanding taxes, other debts and charges, and

- c. By then deducting for the insurance fund provided in G.S. 28A-19 a sum equal to five per cent (5%) of the total value of the property remaining, including amounts paid to the receivership estate from policies of insurance on the absentee's life, and
- d. By transferring or distributing the remaining property as provided in G.S. 28A-13; and

(4) In all three cases by requiring the receiver's account, and upon its approval, discharging him and his bondsmen and entering a final decree terminating the receivership. (1965, c. 815, s. 1.)

§ 28A-13. Distribution of property of absentee. — The property remaining for distribution in accordance with the provisions of G.S. 28A-12, subdivision (3) d shall be transferred or distributed by the receiver in accordance with the judge's decree to those persons who would be entitled thereto under the applicable laws of intestate succession as though the absentee died intestate on the day five years after the date of his disappearance as determined by the judge in his final finding and decree; or, if the absentee leaves a document which, had he died, might have been admissible to probate as his will, the judge administering the receivership shall cause citations to issue to all persons entitled to notice upon the probate of wills in solemn form and determine whether the will would have been admitted to probate, and, if it shall be so determined, the transfer and distribution shall be according to the provisions of the document as of the date of the decree under G.S. 28A-12, subdivision (3) d, subject, however, to the right of the spouse of such absentee, or others, to claim whatever property they would have been entitled by law to claim in derogation of the terms of the will as if the absentee had actually died testate on the date five years after the date of his disappearance as determined by the judge in his final finding and decree. (1965, c. 815, s. 1.)

§ 28A-14. Additional limitations on accounting, distribution or making claim by absentee. — If, at the time of the hearing in G.S. 28A-6 wherein a permanent receiver is appointed by the judge after a finding of disappearance as of a stated date, the date of disappearance so found is more than four years prior to the date of such hearing, the time limited for accounting for or fixed for transferring or distributing the property or its proceeds, or for barring actions by or on behalf of the absentee relative thereto, shall be not less than two years after the date of the appointment of the permanent receiver instead of the five years provided in G.S. 28A-11 (c).

Provided, however, that the time limited for accounting for or fixed for transferring and distributing any additional property or its proceeds within the State coming into the custody and control of the permanent receiver during such two-year period, or for barring actions by or on behalf of the absentee relative thereto, shall be not more than one year after the expiration of said two-year period. (1965, c. 815, s. 1.)

§ 28A-15. When claim of absentee barred. — No action shall be brought by an absentee to recover any portion of the property which is the subject of this proceeding after a final finding and decree as provided for in G.S. 28A-11 (a) or G.S. 28A-11 (c). (1965, c. 815, s. 1.)

§ 28A-16. Laws of administration of estates applicable. — Except as otherwise provided in this chapter, the laws of this State applicable to administration of decedents' estates as to the amount and type of bond, inventories, reports, priority of creditors, compensation and court costs shall govern receivers appointed under this chapter. (1965, c. 815, s. 1.)

§ 28A-17. Appointment of public administrator as receiver for estate of less than one thousand dollars. — Whenever a receiver is to be ap-

pointed under this chapter, and it is found by the judge that the fair value of the estate involved is less than one thousand dollars (\$1,000.00), the judge shall appoint the public administrator as such receiver, if there be one for the county. In case such public administrator is appointed, he shall act as receiver under his official bond as public administrator which shall be liable for any default, and no other bond shall be required. (1965, c. 815, s. 1.)

§ 28A-18. Payment of insurance policies.—(a) At the time of the distribution under G.S. 28A-13 the judge may direct the payment of any sums as they become due on any policies of insurance upon the life of the absentee, to the proper parties as their interest may appear.

(b) If the insurer refuses payment, the judge, upon the filing of appropriate supplemental pleadings in the pending action, shall determine all issues arising upon the pleadings, provided that all issues of fact shall be tried by a jury, unless trial by jury is waived.

(c) Where the required survival of a beneficiary is not established the provisions of this chapter shall apply as if the proceeds of the insurance were a part of the estate of the absentee, unless the absentee retained no interest in the policy.

(d) If in any proceeding under subsection (b) it is determined that the absentee is not dead and the policy provides for a surrender value, the receiver or an otherwise entitled beneficiary acting through the receiver, may demand the payment of the surrender value or obtain a policy loan. The receiver's receipt for such payment of surrender value shall be a release to the insurer of all claims under the policy. The receiver shall pay over to such beneficiary any money so received, first reserving only an amount allowed by the judge as costs of the proceedings under this section and that amount required by G.S. 28A-12 (3) b. (1965, c. 815, s. 1.)

§ 28A-19. Absentee insurance fund.—(a) In each case of termination of the receivership, as provided in G.S. 28A-12, subdivisions (1) and (3), the judge shall set aside the sum therein named for the Absentee Insurance Fund and direct its payment by the receiver to the Treasurer of the State, who shall be liable therefor upon his official bond as for other monies received by him in his official capacity.

(b) The Treasurer shall retain, invest and reinvest all funds thus paid in a separate account entitled the "Absentee Insurance Fund," and add thereto as received the interest or other earnings.

(c) If at any time thereafter, a person declared an absentee whose estate has been distributed under a final finding and decree made as provided in G.S. 28A-13 shall personally appear before the Treasurer and make claim for reimbursement from such fund, the superior court may in an action commenced in the Superior Court of Wake County by such person against the Treasurer, enter a judgment ordering payment to the claimant of such part of the accumulated fund from all sources as in its opinion is found to be fair, adequate and reasonable under the circumstances, taking into account the disposition made of his property, the reasons for his absence, and any other relevant matters.

(d) An action for compensation from the Absentee Insurance Fund shall be begun within three years from the time of the absentee's return. In cases of infancy or other disability recognized by law, persons under such disability shall have one year after the removal of such disability within which to begin the action.

(e) The Treasurer of the State shall from time to time prescribe the rate to be charged for the "Absentee Insurance Fund" under G.S. 28A-12, subdivisions (1) and (3) on the basis of actuarial experience. (1965, c. 815, s. 1.)

§ 28A-20. Provisions applicable to person held incomunicado in foreign country.—As to a person who is known to be held incomunicado in a foreign country, G.S. 28A-1 through G.S. 28A-8 and G.S. 28A-10 may be applied as though such person were an absentee within the meaning of this chapter, and if

his whereabouts becomes unknown, the other provisions of this chapter may be applied by such amendments to the pending proceeding as may be required. (1965, c. 815, s. 1.)

§ 28A-21. When agents' acts binding on estate of absentee.—Acts of an agent of an absentee, carried out in good faith, prior to the appointment of a receiver under this chapter, shall be binding on the estate of such absentee if said acts were within the scope of the agent's real or apparent authority. (1965, c. 815, s. 1.)

§ 28A-22. Provisions of chapter severable. — If any provisions of this chapter or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. (1965, c. 815, s. 1.)

Chapter 29.

Intestate Succession.

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ARTICLE 1.

General Provisions.

§ 29-1. Short title.—This chapter shall be known and may be cited as the Intestate Succession Act. (1959, c. 879, s. 1.)

Editor's Note.—Session Laws 1959, c. 879, s. 1, inserted this new chapter numbered 29 and entitled "Intestate Succession" to replace, as of July 1, 1960, former chapter 29 entitled "Descents." By the same act § 28-149, with regard to order of distribution, was repealed, effective July 1, 1960, and other related statutory provisions were repealed or amended to conform with the new Intestate Succession Law. Section 15 of the 1959 act provides: "This act shall become effective July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

The provisions of the repealed chapter 29 were derived from the following statutory provisions: 1784, c. 204, s. 2; 1799, c. 522; 1801, c. 575, s. 1; 1808, c. 739; 1823, c. 1210; 1844, c. 51, ss. 1, 2; R. C., c. 38, s. 1; 1879, c. 73; Code, s. 1281; 1897, c. 153; Rev., s. 1556; 1913, c. 71; 1915, c. 9, s. 1; C. S., s. 1654; 1925, c. 7; 1935, c. 256; 1945, c. 520; 1947, c. 832; 1953, c. 1077, s. 1; 1955, c. 540, s. 4; c. 542, s. 2; c. 813, ss. 3, 4. And the provisions of repealed § 28-149 were derived from the following statutory provisions: R. S., c. 64, s. 1; R. C., c. 64, s. 1; 1868-9, c. 113, s. 53; Code, s. 1478; 1893, c. 82; Rev., s. 132; 1913, c.

§ 29-2. Definitions.—As used in this chapter, unless the context otherwise requires, the term:

- (1) "Advancement" means an irrevocable inter vivos gift of property, made by an intestate donor to any person who would be his heir or one of his heirs upon his death, and intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift; except that no gift to a spouse shall be considered an advancement unless so designated by the intestate donor in a writing signed by the donor at the time of the gift.
- (2) "Estate" means all the property of a decedent, including but not limited to:
 - a. An estate for the life of another; and
 - b. All future interests in property not terminable by the death of the owner thereof, including all reversions, remainders, executory interests, rights of entry and possibilities of reverter, subject, however, to all limitations and conditions imposed upon such future interests.
- (3) "Net estate" means the estate of a decedent, exclusive of family allowances, costs of administration, and all lawful claims against the estate.
- (4) "Heir" means any person entitled to take real or personal property upon intestacy under the provisions of this chapter.
- (5) "Lineal descendants" of a person means all children of such person and successive generations of children of such children.

(6) "Share," when used to describe the share of a net estate or property which any person is entitled to take, includes both the fractional share of the personal property and the undivided fractional interest in the real property, which the person is entitled to take. (1959, c. 879, s. 1; 1961, c. 958, s. 1.)

Editor's Note.—The 1961 amendment, effective July 1, 1961, rewrote the exception clause at the end of subdivision (1).

Estate Tail Distinguishable from Life Estate with Remainder.—Inasmuch as an estate tail is an estate of inheritance which descends to particular heirs, it is distinguishable from a life estate with remainder. *Strickland v. Jackson*, 259 N. C. 81, 130 S. E. (2d) 22 (1963).

The distinction between a vested and a contingent remainder is the capacity to take upon the termination of the preceding estate. *Strickland v. Jackson*, 259 N. C. 81, 130 S. E. (2d) 22 (1963).

Where those who are to take in remainder cannot be determined until the happening of a stated event, the remainder is contingent. *Strickland v. Jackson*, 259 N. C. 81, 130 S. E. (2d) 22 (1963).

Legacies Not Excluded in Determining Net Estate.—The phrase "all lawful claims against the estate," as used in subdivision (3), does not include either specific legacies or general legacies for specific amounts. If it did, the net estate in many instances would be so deleted by their payment that it would be insufficient to provide the widow with the same share of her husband's real and personal property as if he died intestate. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N. C. 81, 130 S. E. (2d) 22 (1963).

§ 29-3. Certain distinctions as to intestate succession abolished.—In the determination of those persons who take upon intestate succession there is no distinction:

- (1) Between real and personal property, or
- (2) Between ancestral and nonancestral property, or
- (3) Between relations of the whole blood and those of the half blood. (1959, c. 879, s. 1.)

Distinctions Abolished Only for Purposes of Determining Succession.—This section abolishes the distinction between real and personal property only in the

259 N. C. 255, 130 S. E. (2d) 387 (1963).

As Legacies or Distributive Shares Are Not "Lawful Claims."—In the use of the phrase "lawful claims against the estate" in subdivision (3), the legislature was not referring to claims of beneficiaries created either by the will or the statute of descents and distributions. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N. C. 255, 130 S. E. (2d) 387 (1963).

Residue of Net Estate after Distribution to Dissenting Widow.—When the dissenting widow is entitled to one half of the deceased spouse's net estate as defined in subdivision (3) of this section, § 30-3 (c) says that the residue of the testator's net estate for distribution to other devisees and legatees is as defined in this section. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N. C. 255, 130 S. E. (2d) 387 (1963).

Definition of "Share" Applies to Share of Net Estate.—The definition contained in subdivision (6) is intended to apply when "share" is used "to describe the share of a net estate or property," e.g., a share under § 29-14, which "includes . . . the undivided fractional interest in the real property." *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Cited in *Dudley v. Staton*, 257 N. C. 572, 126 S. E. (2d) 590 (1962).

§ 29-4. Curtesy and dower abolished.—The estates of courtesy and dower are hereby abolished. (1959, c. 879, s. 1.)

Cited in *Dudley v. Staton*, 257 N. C.

572, 126 S. E. (2d) 590 (1962).

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Cited in *Dudley v. Staton*, 257 N. C.

572, 126 S. E. (2d) 590 (1962).

§ 29-5. Computation of next of kin.—Degrees of kinship shall be computed as provided in G. S. 104A-1. (1959, c. 879, s. 1.)

§ 29-6. Lineal succession unlimited.—There shall be no limitation on the right of succession by lineal descendants of an intestate. (1959, c. 879, s. 1.)

§ 29-7. Collateral succession limited.—There shall be no right of succession by collateral kin who are more than five degrees of kinship removed from an intestate; provided that if there is no collateral relative within the five degrees of kinship referred to herein, then collateral succession shall be unlimited to prevent any property from escheating. (1959, c. 879, s. 1.)

§ 29-8. Partial intestacy.—If part but not all of the estate of a decedent is validly disposed of by his will, the part not disposed of by such will shall descend and be distributed as intestate property. (1959, c. 879, s. 1.)

§ 29-9. Inheritance by unborn infant.—Lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him. (1959, c. 879, s. 1.)

Child Born after Ten Months. — If a child is born more than ten lunar months or 280 days after the death of the intestate, the presumption is that the child was not en ventre sa mere when the intestate died,

but this presumption may be rebutted by evidence tending to show that he was in fact the father of the child. *Byerly v. Tolbert*, 250 N. C. 27, 108 S. E. (2d) 29 (1959), decided under former Rule 7 of old § 29-1.

§ 29-10. Renunciation.—(a) An heir may renounce the succession to his share of the estate of an intestate, and such renunciation shall be retroactive to the date of the death of the intestate. The renunciation shall be by a signed and acknowledged writing, executed by the heir in person, or by his duly authorized attorney, guardian, or next friend when approved by the clerk of the superior court and the resident judge of the superior court, and shall be delivered to the clerk of the superior court of the county in which the administrator or collector qualifies.

(b) Such renunciation must be filed within four months after the death of the intestate if letters of administration are not issued within that period, or if letters of administration are issued during that period, then within two months after the date of such issuance, or if litigation that affects the share of the heir in the estate is pending at the expiration of such period for filing the renunciation, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(c) In case of such renunciation the property shall descend in accordance with the applicable provisions of this chapter as though the person renouncing had died immediately prior to the intestate; provided that in no event shall the persons who inherit by representation in the place of the renouncer receive from the renouncement a greater share of the estate than the renouncer would have received.

(d) If no renunciation is made in the manner and within the time provided for in subsections (a) and (b) hereof, the heir shall be conclusively deemed to have waived his or her right to renounce.

(e) Any mortgage, deed of trust, or other encumbrance, or any conveyance or contract to convey any property or interest in the estate of an intestate made by an heir during the period allowed for renunciation, or any such transaction by a person relating to his expectancy to inherit, shall constitute a waiver of his right of renunciation as provided in subsection (a) hereof. Provided such waiver shall be effective as against the personal representative only from the time written notice thereof is delivered by any interested party to the clerk of the superior court of the county in which renunciation must be filed.

(f) Every renunciation and notice of waiver of renunciation as provided for in subsections (a) and (e) hereof shall be filed with the clerk of superior court and cross-indexed by the clerk in a record entitled "Renunciation" to be kept by him pursuant to G. S. 2-42 (33).

(g) If a decedent dies intestate as to a portion of his estate, this section shall apply to that portion. (1959, c. 879, s. 1; 1961, c. 958, s. 2.)

Editor's Note.—The 1961 amendment, effective July 1, 1961, rewrote subsections (a), (b) and (c) and added subsections (d) to (g).

Renunciation by Administrator.—Where a son died intestate, and his father was the administrator of his estate, and the father and his wife were the sole heirs

and beneficiaries of their son's estate, renunciation was permissible within the intent and purpose of this section. The renunciation, however, would not adversely affect any rights or defenses asserted to defeat any claim on behalf of the estate. *In re Estate of Glenn*, 258 N. C. 351, 128 S. E. (2d) 408 (1962).

§ 29-11. Aliens.—Unless otherwise provided by law, it shall be no bar to intestate succession by any person, that he, or any person through whom he traces his inheritance, is or has been an alien. (1959, c. 879, s. 1.)

§ 29-12. Escheats.—If there is no person entitled to take under G. S. 29-14 or G. S. 29-15, or if in case of an illegitimate intestate, there is no one entitled to take under G. S. 29-21 or G. S. 29-22 the net estate shall escheat as provided in G. S. 116-21. (1959, c. 879, s. 1; 1961, c. 83.)

Editor's Note.—The 1961 amendment struck out the words and figures "G. S. 29-

20 or G. S. 29-21" and inserted in lieu thereof "G. S. 29-21 or G. S. 29-22."

ARTICLE 2.

Shares of Persons Who Take Upon Intestacy.

§ 29-13. Descent and distribution upon intestacy.—All the estate of a person dying intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against the estate, and subject to the payment by the recipient of State inheritance taxes, as provided in this chapter. (1959, c. 879, s. 1.)

Quoted in *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

§ 29-14. Share of surviving spouse.—The share of the surviving spouse shall be as follows:

- (1) If the intestate is survived by only one child or by any lineal descendant of only one deceased child, one half of the net estate, including one half of the personal property and a one-half undivided interest in the real property; or
- (2) If the intestate is survived by two or more children, or by one child and any lineal descendant of one or more deceased children or by lineal descendants of two or more deceased children, one third of the net estate, including one third of the personal property and a one-third undivided interest in the real property; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children but is survived by one or more parents, a one-half undivided interest in the real property and the first ten thousand dollars (\$10,000.00) in value plus one half of the remainder of the personal property; or
- (4) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children or by a parent, all the net estate. (1959, c. 879, s. 1.)

This section defines the share of the surviving spouse of an intestate. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

Definition of "Share" in § 29-2 (6) Applies.—The definition contained in § 29-2 (6) is intended to apply when "share" is used "to describe the share of a net estate or property," e.g., a share under this sec-

tion which thus "includes . . . the undivided fractional interest in the real property." *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Surviving Wife and Child Each Take Undivided One Half of Lands.—Upon the death of an intestate, title to his lands immediately vests in his wife and child under

this section, each taking a one-half undivided interest in fee. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965).

Applied in *Smith v. Perdue*, 258 N.C. 686, 129 S.E. (2d) 293 (1963); *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

Cited in *Ivery v. Ivery*, 258 N.C. 721, 129 S.E. (2d) 457 (1963); *Forgy v. Schwartz*, 262 N.C. 185, 136 S.E.2d 668 (1964).

§ 29-15. Shares of others than surviving spouse.—Those persons surviving the intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate if there is no surviving spouse, as follows:

- (1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G. S. 29-16; or
- (2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G. S. 29-16; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by both parents, they shall take in equal shares, or if either parent is dead, the surviving parent shall take the entire share; or
- (4) If the intestate is not survived by such children or lineal descendants or by a parent, the brothers and sisters of the intestate, and the lineal descendants of any deceased brothers or sisters, shall take as provided in G. S. 29-16; or
- (5) If there is no one entitled to take under the preceding subdivisions of this section or under G. S. 29-14,
 - a. The paternal grandparents shall take one half of the net estate in equal shares, or, if either is dead, the survivor shall take the entire one half of the net estate, and if neither paternal grandparent survives, then the paternal uncles and aunts of the intestate and the lineal descendants of deceased paternal uncles and aunts shall take said one half as provided in G. S. 29-16; and
 - b. The maternal grandparents shall take the other one half in equal shares, or if either is dead, the survivor shall take the entire one half of the net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take one half as provided in G. S. 29-16; but
 - c. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the paternal side, then those on the maternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take the whole; or
 - d. If there is no grandparent and no uncle or aunt, or lineal descendant of a deceased uncle or aunt, on the maternal side, then those on the paternal side who otherwise would be entitled to take one half as hereinbefore provided in this subdivision shall take the whole. (1959, c. 879, s. 1.)

ARTICLE 3.

Distribution Among Classes.

§ 29-16. Distribution among classes.—(a) Children and Their Lineal Descendants.—If the intestate is survived by lineal descendants, their respective shares in the property which they are entitled to take under G. S. 29-15 of this chapter shall be determined in the following manner:

- (1) Children.—To determine the share of each surviving child, divide the property by the number of surviving children plus the number of deceased children who have left lineal descendants surviving the intestate.
- (2) Grandchildren.—To determine the share of each surviving grandchild by a deceased child of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving grandchildren plus the number of deceased grandchildren who have left lineal descendants surviving the intestate.
- (3) Great-Grandchildren.—To determine the share of each surviving great-grandchild by a deceased grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-grandchildren plus the number of deceased great-grandchildren who have left lineal descendants surviving the intestate.
- (4) Great-Great-Grandchildren.—To determine the share of each surviving great-great-grandchild by a deceased great-grandchild of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving great-great-grandchildren plus the number of deceased great-great-grandchildren who have left lineal descendants surviving the intestate.
- (5) Other Lineal Descendants of Children.—Divide, according to the formula established in the preceding subdivisions of this subsection, any property not taken under such preceding subdivisions, among the lineal descendants of the children of the intestate not already participating.

(b) Brothers and Sisters and Their Lineal Descendants.—If the intestate is survived by brothers and sisters or the lineal descendants of deceased brothers and sisters, their respective shares in the property which they are entitled to take under G. S. 29-15 of this chapter shall be determined in the following manner:

- (1) Brothers and Sisters.—To determine the share of each surviving brother and sister, divide the property by the number of surviving brothers and sisters plus the number of deceased brothers and sisters who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.
- (2) Nephews and Nieces.—To determine the share of each surviving nephew or niece by a deceased brother or sister of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of such surviving nephews or nieces plus the number of deceased nephews and nieces who have left lineal descendants surviving the intestate within the fifth degree of kinship to the intestate.
- (3) Grandnephews and Grandnieces.—To determine the share of each surviving grandnephew or grandniece by a deceased nephew or niece of the intestate in the property not taken under the preceding subdivisions of this subsection, divide that property by the number of such surviving grandnephews and grandnieces plus the number of de-

ceased grandnephews and grandnieces who have left children surviving the intestate.

- (4) Great-Grandnephews and Great-Grandnieces.—Divide equally among the great-grandnephews and great-grandnieces of the intestate any property not taken under the preceding subdivisions of this subsection.
- (5) Grandparents and Others.—If there is no one within the fifth degree of kinship to the intestate entitled to take the property under the preceding subdivisions of this subsection, then the intestate's property shall go to those entitled to take under G. S. 29-15 (5).

(c) Uncles and Aunts and Their Lineal Descendants.—If the intestate is survived by uncles and aunts or the lineal descendants of deceased uncles and aunts, their respective shares in the property which they are entitled to take under G. S. 29-15 shall be determined in the following manner:

- (1) Uncles and Aunts.—To determine the share of each surviving uncle and aunt, divide the property by the number of surviving uncles and aunts plus the number of deceased uncles and aunts who have left children or grandchildren surviving the intestate.
- (2) Children of Uncles and Aunts.—To determine the share of each surviving child of a deceased uncle or aunt of the intestate in the property not taken under the preceding subdivision of this subsection, divide that property by the number of surviving children of deceased uncles and aunts plus the number of deceased children of deceased uncles and aunts who have left children surviving the intestate.
- (3) Grandchildren of Uncles and Aunts.—Divide equally among the grandchildren of uncles and aunts of the intestate any property not taken under the preceding subdivisions of this subsection. (1959, c. 879, s. 1.)

Not Function of Administrator to Partition Real Estate. — It is the duty of the administrator to make distribution of the surplus of his intestate's personal property among those entitled thereto, but it is not

his function to partition the real estate of his decedent among the heirs. *King v. Neese*, 233 N. C. 132, 63 S. E. 123 (1951), decided under former § 28-149.

ARTICLE 4.

Adopted Children.

§ 29-17. Succession by, through and from adopted children.—(a) A child, adopted in accordance with chapter 48 of the General Statutes or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to any property by, through and from his adoptive parents and their heirs the same as if he were the natural legitimate child of the adoptive parents.

(b) An adopted child is not entitled by succession to any property, by, through, or from his natural parents or their heirs, except as provided in subsection (e) of this section.

(c) The adoptive parents and the heirs of the adoptive parents are entitled by succession to any property, by, through and from an adopted child the same as if the adopted child were the natural legitimate child of the adoptive parents.

(d) The natural parents and the heirs of the natural parents are not entitled by succession to any property, by, through or from an adopted child, except as provided in subsection (e) of this section.

(e) If a natural parent has previously married, is married to, or shall marry an adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession. (1959, c. 879, s. 1.)

Editor's Note.—For article on interstate and foreign adoptions in North Carolina, see 40 N. C. Law Rev. 691.

The right of an adopted child to inherit vests as of the death of her adoptive parent, and therefore where the parent died prior to the effective date of an act creating a new rule of descent and of distribution the act is not applicable. *Wilson v. Anderson*, 232 N. C. 521, 61 S. E. (2d) 447 (1950).

Former Rule 14 of old § 29-1 and § 28-149 (10), as enacted by Session Laws 1947, c. 879, had prospective effect only, and therefore a child adopted in 1919, under the law prescribing that such child should be entitled to inherit only from the adopting parent, was not entitled to inherit either realty or personality from the brother of her deceased father by adoption, even though the brother died subsequent to the effective date of the 1947 act. *Wilson v. Anderson*, 232 N. C. 212, 59 S. E. (2d) 836 (1950).

Under the provisions of Session Laws 1955, c. 813, s. 6, an adopted child was entitled to inherit property from the brother of the adopting parent, notwithstanding that the decree of adoption was entered prior to the passage of the statute, the legislature having the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act. *Bennett v. Cain*, 248 N. C. 428, 103 S. E. (2d) 510 (1958).

The legislature has provided that an

adopted child from the date of its adoption shall have the same property rights as a natural born child from the date of its birth. *Headen v. Jackson*, 255 N. C. 157, 120 S. E. (2d) 598 (1961), decided under former § 28-149, old § 29-1 and § 48-23.

Any provision of law which prevented an adopted child from sharing in property by descent or distribution in the same manner and to the same extent as a natural born child, was swept away by the repealing clause in chapter 813, Session Laws of 1955. *Headen v. Jackson*, 255 N. C. 157, 120 S. E. (2d) 598 (1961).

An adopted child shall be entitled to inherit property by, through, and from his adoptive parents as if he were born the legitimate child of the adoptive parents. *Greenlee v. Quinn*, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

Section Has No Bearing Upon Whether Adopted Child Takes under Will. — The statutes relating to the right of adopted children to take as distributees and heirs have no bearing upon whether an adopted child takes under a will, except in so far as they establish and define the parent and child relationship between the adoptive parents and the adopted child. *Bradford v. Johnson*, 237 N. C. 572, 75 S. E. (2d) 632 (1953), decided under former § 28-149 and old § 29-1.

Antilapse Statute Applies to Adopted Child of Legatee. — See note to § 48-23.

ARTICLE 5.

Legitimated Children.

§ 29-18. Succession by, through and from legitimated children.—A child born an illegitimate who shall have been legitimated in accordance with G. S. 49-10 or G. S. 49-12 or in accordance with the applicable law of any other jurisdiction, and the heirs of such child, are entitled by succession to property by, through and from his father and mother and their heirs the same as if born in lawful wedlock; and if he dies intestate, his property shall descend and be distributed as if he had been born in lawful wedlock. (1959, c. 879, s. 1.)

Right to Inherit by, through and from Parents.—A legitimated child shall have the same right to inherit by, through, and from his father and mother as if such child had been born in lawful wedlock. *Greenlee v. Quinn*, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

Right to Inherit from Collaterals.—The legislature intended to confer upon the legitimated child the same right to inherit from collateral relations as it would have had if he had been born in lawful wedlock. *Greenlee v. Quinn*, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

ARTICLE 6.

Illegitimate Children.

§ 29-19. Succession by illegitimate children.—For purposes of intestate succession, an illegitimate child shall be treated as if he were the legitimate

child of his mother, so that he and his lineal descendants are entitled to take by, through and from his mother and his other maternal kindred, both descendants and collaterals, and they are entitled to take from him. (1959, c. 879, s. 1.)

No Inheritance from Father.—Under the intestacy laws, an illegitimate child cannot inherit from his father or his father's relatives. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

§ 29-20. Descent and distribution upon intestacy of illegitimate children.—All the estate of a person dying illegitimate and intestate shall descend and be distributed, subject to the payment of costs of administration and other lawful claims against his estate, and subject to the payment by the recipient of State inheritance taxes, as provided in this article. (1959, c. 879, s. 1.)

§ 29-21. Share of surviving spouse.—The share of the surviving spouse of an illegitimate intestate shall be the same as provided in G. S. 29-14 for the surviving spouse of a legitimate person except:

- (1) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his or her mother, a one-half undivided interest in the real property and the first ten thousand dollars (\$10,000.00) in value plus one half of the remainder of the personal property; or
- (2) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, or his mother, the surviving spouse shall take all of the net estate. (1959, c. 879, s. 1.)

§ 29-22. Shares of others than the surviving spouse.—Those persons surviving the illegitimate intestate, other than the surviving spouse, shall take that share of the net estate not distributable to the surviving spouse, or the entire net estate, if there is no surviving spouse, as follows:

- (1) If the intestate is survived by only one child or by only one lineal descendant of only one deceased child, that person shall take the entire net estate or share, but if the intestate is survived by two or more lineal descendants of only one deceased child, they shall take as provided in G. S. 29-16; or
- (2) If the intestate is survived by two or more children or by one child and any lineal descendant of one or more deceased children, or by lineal descendants of two or more deceased children, they shall take as provided in G. S. 29-16; or
- (3) If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his mother, she shall take the entire net estate or share; or
- (4) If the intestate is not survived by such children or lineal descendants or by a surviving mother, the other children of the mother of the intestate, whether legitimate or illegitimate, and the lineal descendants of any such children who are deceased, shall take as provided in G. S. 29-16; or
- (5) If there is no one entitled to take under the preceding subdivisions of this section or under G. S. 29-21, the maternal grandparents shall divide the entire net estate or if either is dead the survivor shall take the entire net estate, and if neither maternal grandparent survives, then the maternal uncles and aunts of the intestate and the lineal descendants of deceased maternal uncles and aunts shall take as provided in G. S. 29-16. (1959, c. 879, s. 1.)

ARTICLE 7.

Advancements.

§ 29-23. In general.—If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share, shall be taken into account in computing the estate to be distributed. (1959, c. 879, s. 1.)

A child must account for advancements in order to share by inheritance or by distribution in the real estate and personal property owned by the parent at death, and therefore it must be ascertained that

the parent left property before the question of advancements can arise. Atkinson v. Bennett, 242 N. C. 456, 88 S. E. (2d) 76 (1955), decided under former Rule 2 of old § 29-1.

§ 29-24. Presumption of gift.—A gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement unless shown to be an advancement. (1959, c. 879, s. 1.)

Right to Change Advancement into Gift.—While a parent cannot change into an advancement that which was intended as a gift at the time of delivery, there is no apparent reason why a parent cannot by deed change into a gift that which was at the time of delivery intended as an advancement. Atkinson v. Bennett, 242 N. C. 456, 88 S. E. (2d) 76 (1955), decided under former Rule 2 of old § 29-1.

Where more than a year after an alleged

advancement, the parent executes a deed conveying all of her property in equal division between two of the children, without providing for advancements previously made, the asserted advancement to one of them should not be taken into account in the division of the property conveyed by the deed. Atkinson v. Bennett, 242 N. C. 456, 88 S. E. (2d) 76 (1955), decided under former Rule 2 of old § 29-1.

§ 29-25. Effect of advancement.—If the amount of the advancement equals or exceeds the intestate share of the advance, he shall be excluded from any further portion in the distribution of the estate, but he shall not be required to refund any part of such advancement; and if the amount of the advancement is less than his share, he shall be entitled to such additional amount as will give him his full share of the intestate donor's estate. (1959, c. 879, s. 1.)

Purpose.—The proviso to former Rule 2 of old § 29-1 was enacted to establish a perfect equality in the division of the intestate's whole estate, real and personal, amongst an intestate's children, excepting

only that no property given by a parent to a child is in any case to be taken away. King v. Neese, 233 N. C. 132, 63 S. E. (2d) 123 (1951). See Atkinson v. Bennett, 242 N. C. 456, 88 S. E. (2d) 76 (1955).

§ 29-26. Valuation.—The value of the property given as an advancement shall be determined as of the time when the advancee came into possession or enjoyment, or at the time of the death of the intestate, whichever first occurs. However, if the value of the property, so advanced, is stated by the intestate donor in a writing signed by him and designating the gift as an advancement, such value shall be deemed the value of the advancement. (1959, c. 879, s. 1.)

§ 29-27. Death of advancee before intestate donor.—If the advancee dies before the intestate donor leaving a lineal heir or heirs who take by intestate succession from the intestate donor, the advancement shall be taken into account in the same manner as if it had been made directly to such heir or heirs, but the value shall be determined as of the time the original advancee came into possession or enjoyment, or when the heir or heirs came into possession or enjoyment; or at the time of the death of the intestate donor, whichever first occurs. (1959 c. 879, s. 1; 1961, c. 958, s. 3.)

Editor's Note.—The 1961 amendment, of phraseology in the first sentence and effective July 1, 1961, made slight changes deleted the former second sentence.

§ 29-28. Inventory.—If any person who has, in the lifetime of an intestate donor, received a part of the donor's property, refuses, upon order of the clerk of superior court of the county in which the administrator or collector qualifies, to give an inventory on oath, setting forth therein to the best of his knowledge and belief the particulars of the transfer of such property, he shall be considered to have received his full share of the donor's estate, and shall not be entitled to receive any further part or share. (1959, c. 879, s. 1.)

§ 29-29. Release by advancee.—If the advancee acknowledges to the intestate donor by a signed writing that he has been advanced his full share of the intestate donor's estate, both he and those claiming through him shall be excluded from any further participation in the intestate donor's estate. (1959, c. 879, s. 1.)

ARTICLE 8.

Election to Take Life Interest in Lieu of Intestate Share.

§ 29-30. Election of surviving spouse to take life interest in lieu of intestate share provided.—(a) In lieu of the share provided in G.S. 29-14 or 29-21, the surviving spouse of an intestate or the surviving spouse who dissents from the will of a testator shall be entitled to take as his or her intestate share a life estate in one third in value of all the real estate of which the deceased spouse was seised and possessed of an estate of inheritance at any time during coverture, except that real estate as to which the surviving spouse:

- (1) Has waived his or her rights by joining with the other spouse in a conveyance thereof, or
- (2) Has released or quitclaimed his or her interest therein in accordance with G.S. 52-10, or
- (3) Was not required by law to join in conveyance thereof in order to bar the elective life estate, or
- (4) Is otherwise not legally entitled to the election provided in this section.

(b) Regardless of the value thereof and despite the fact that a life estate therein might exceed the fractional limitation provided for in subsection (a), the life estate provided for in subsection (a) shall at the election of the surviving spouse include a life estate in the usual dwelling house occupied by the surviving spouse at the time of the death of the deceased spouse if such dwelling house were owned by the deceased spouse at the time of his or her death, together with the outbuildings, improvements and easements thereunto belonging or appertaining, and lands upon which situated and reasonably necessary to the use and enjoyment thereof, as well as a fee simple ownership in the household furnishings therein.

(c) The election provided for in subsection (a) shall be made by the filing of a notice thereof with the clerk of the superior court of the county in which the administration of the estate is pending, or, if no administration is pending, then with the clerk of the superior court of any county in which the administration of the estate could be commenced. Such election shall be made:

- (1) At any time within one month after the expiration of the time fixed for the filing of a dissent, or
- (2) In case of intestacy, then within twelve months after the death of the deceased spouse if letters of administration are not issued within that period, or
- (3) If letters of administration are issued within twelve months after the date of the death of the deceased spouse, then within one month after the expiration of the time limited for filing claims against the estate, or
- (4) If litigation that affects the share of the surviving spouse in the estate is pending, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

The notice of election shall:

- a. Be directed to the clerk with whom filed;
- b. State that the surviving spouse making the same elects to take under this section rather than under the provisions of G. S. 29-14 or 29-21, as applicable;
- c. Set forth the names of all heirs, devisees, legatees, personal representatives and all other persons in possession of or claiming an estate or an interest in the property described in subsection (a); and
- d. Request the allotment of the life estate provided for in subsection (a).

The notice of election may be in person, or by attorney authorized in a writing executed and duly acknowledged by the surviving spouse and attested by at least one witness. If the surviving spouse is a minor or an incompetent, the notice of election may be executed and filed by a general guardian or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the notice of election may be executed and filed by a next friend appointed by the clerk. The notice of election, whether in person or by attorney, shall be filed as a record of the court, and a summons together with a copy of the notice shall be served upon each of the interested persons named in the notice of election.

(d) In case of election to take a life estate in lieu of an intestate share, as provided in either G. S. 29-14, G. S. 29-21, or G. S. 30-3 (a), the clerk of superior court, with whom the notice of election has been filed, shall summon and appoint a jury of three disinterested persons who being first duly sworn shall promptly allot and set apart to the surviving spouse the life estate provided for in subsection (a) and make a final report of such action to the clerk.

(e) The final report shall be filed by the jury not more than sixty days after the summoning and appointment thereof, shall be signed by all jurors, and shall describe by metes and bounds the real estate in which the surviving spouse shall have been allotted and set aside a life estate. It shall be filed as a record of court and a certified copy thereof shall be filed and recorded in the office of the register of deeds of each county in which any part of the real property of the deceased spouse, affected by the allotment, is located.

(f) In the election and procedure to have the life estate allotted and set apart provided for in this section, the rules of procedure relating to partition proceedings shall apply except insofar as the same would be inconsistent with the provisions of this section.

(g) Neither the household furnishings in the dwelling house nor the life estates taken by election under this section shall be subject to the payment of debts due from the estate of the deceased spouse, except those debts secured by such property as follows:

- (1) By a mortgage or deed of trust in which the surviving spouse has waived his or her rights by joining with the other spouse in the making thereof; or
- (2) By a purchase money mortgage or deed of trust, or by a conditional sales contract of personal property in which title is retained by the vendor, made prior to or during the marriage; or
- (3) By a mortgage or deed of trust made prior to the marriage; or
- (4) By a mortgage or deed of trust constituting a lien on the property at the time of its acquisition by the deceased spouse either before or during the marriage.

(h) If no election is made in the manner and within the time provided for in subsection (c) the surviving spouse shall be conclusively deemed to have waived his or her right to elect to take under the provisions of this section, and any interest which the surviving spouse may have had in the real estate of the deceased

spouse by virtue of this section shall terminate. (1959, c. 879, s. 1; 1961, c. 958, ss. 4-8; 1965, c. 848.)

Editor's Note.—The 1961 amendment, effective July 1, 1961, inserted in line three of subsection (b) the words "at the election of the surviving spouse." The amendment rewrote all of subsection (c) except the last paragraph. It substituted in line two of subsection (d) the words and figures "either G. S. 29-14, G. S. 29-21, or G. S. 30-3 (a)" for "subsection (a)." The amendment also rewrote subsections (g) and (h).

The 1965 amendment rewrote the exception at the end of subsection (a).

Section Preserves Benefits of Dower and Curtesy.—Dower, as such, has been abolished in North Carolina, but this section preserves to a surviving spouse the benefits of the former rights of dower and curtesy. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Law Is Concerned with Rights under This Section.—Dower was a favorite of the law and was an elongation of the husband's estate, and the widow held in priority with the heirs and those claiming under them. The courts are no less concerned with the rights of a surviving spouse under this section. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Surviving Spouse Is Given Election So as Not to Be Rendered Penniless.—The reason for granting the surviving spouse an election or choice is to prevent such spouse from being rendered penniless and turned out of doors by reason of a small net estate or an insolvent estate. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

The life estate, which the surviving spouse elects, is not subject to the payment of the ordinary debts due from the estate of the deceased spouse. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Thus, Spouse Would Elect Life Estate Where Estate Is Insolvent.—A surviving spouse would certainly elect to take a life estate where it would require a sale of all of the property of deceased's estate to pay the debts. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Different Time Limits Are Fixed to Give Surviving Spouse Opportunity to Decide.—The reason different time limits are fixed for making the election, under the different circumstances, as set out in subsections (c) (1), (2), (3) and (4), is to give the surviving spouse ample opportunity to make a decision as to which choice is most beneficial. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

"Share" under Subsection (c) (4) Means

Any Share Spouse Is Entitled to.—As used in subsection (c) (4), "share" means such share in the estate (not necessarily the net estate or property) as the surviving spouse shall be entitled to take by any provision of this chapter. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Any Litigation Affecting Spouse's Choice Affects Such Share.—Any litigation which may substantially and materially affect the choice the surviving spouse is entitled to make "affects the share of the surviving spouse in the estate" under subsection (c) (4). Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Such as Suit on Disputed Claim Large Enough to Render Estate Insolvent.—If there is a disputed claim which, if allowed, would render the estate insolvent or nearly so, and which, if disallowed, would leave a large net estate, the outcome of the suit on the claim would affect the share of the surviving spouse and might well determine the matter of election, though the subject of the litigation is a mere debt and not the title to land. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Or Suit to Set Aside Deed from Son to Surviving Spouse of His Interest in Estate.—Where, before the time limit for making an election, as provided in subsection (c) (3), had expired, a son instituted litigation to set aside a deed to his mother of his interest in his deceased father's lands, on the ground that she had defrauded him, the outcome of the litigation would affect her choice or election, i.e., her share of the estate. The pendency of the litigation extended her time for making the election. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Subsection (c) (4) Authorizes Fixing of Time for Election Where Such Litigation Is Pending.—Subsection (c) (4) contemplates that the outcome of the litigation may well determine whether the surviving spouse will elect to take a life estate. Therefore, it authorizes the surviving spouse, if such litigation is pending, to request of the clerk a written order allowing a reasonable time within which the notice of election and the proceedings pursuant thereto may be filed and instituted. Upon such request, it becomes the duty of the clerk forthwith to make a written order fixing a time within which an election may be filed in accordance with subsection (c). Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Time Allowed Should Be Reasonable Time after Litigation Ends.—The time al-

lowed under subsection (c) (4) should be such time after the termination of the pending litigation as to the clerk, in the exercise of his sound discretion, seems reasonable under the circumstances. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

And Twenty Days Is Not Unreasonable.
—Twenty days allowed under subsection (c) (4) by the clerk for filing notice of election and issuing of summons is not unreasonable. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

The order fixing the time limit under subsection (c) (4) must be made forthwith upon the ex parte request of the surviving spouse. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Such Order Is Only Ministerial. — The written order under subsection (c) (4) is only ministerial, it merely fixes the time limit, and it is not an adjudication of any issues or questions of law which may be raised in the proceeding between the sur-

viving spouse and other interested parties. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Rights of Parties Are Not Determined Until Later.—The rights of the parties are determined after notice of election has been filed pursuant to the order fixing the time limit, summons served and the pleadings are in. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Procedure Is in Accordance with Rules Relating to Partition.—Proceedings determining the rights of the parties and allotting the life estate are in accordance with the rules of procedure relating to partition of lands as far as practicable. Smith v. Smith, 265 N.C. 18, 143 S.E.2d 300 (1965).

Applied in Lucas v. Felder, 261 N.C. 169, 134 S.E.2d 154 (1964).

Cited in Smith v. Smith, 265 N.C. 34, 143 S.E.2d 311 (1965); **Samet v. United States,** 242 F. Supp. 214 (M.D.N.C. 1965).

Chapter 30.

Surviving Spouses.

Article 1.

Dissent from Will.

Sec.	
30-1.	Right of dissent.
30-2.	Time and manner of dissent.
30-3.	Effect of dissent.

Article 2.

Dower.

30-4 to 30-10.	[Repealed.]
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Article 3.

Allotment of Dower.

Sec.	
30-11 to 30-14.	[Repealed.]

Article 4.

Year's Allowance.

Part 1.	Nature of Allowance.
30-15.	When spouse entitled to allowance.
Part 3.	Assigned in Superior Court.
30-27.	Surviving spouse or child may apply to superior court.

ARTICLE 1.

Dissent from Will.

§ 30-1. Right of dissent.—(a) A spouse may dissent from his deceased spouse's will in those cases where the aggregate value of the provisions under the will for benefit of the surviving spouse, when added to the value of the property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator:

- (1) Is less than the intestate share of such spouse, or
- (2) Is less than one half of the deceased spouse's net estate in those cases where the deceased spouse is not survived by a child, children, or any lineal descendant of a deceased child or children, or by a parent.

(b) For the purpose of subsection (a) of this section and by way of illustration and not of limitation, the following shall, subject to the exception hereinafter set forth, be included in the computation of the value of the property or interests in property passing to the surviving spouse as a result of the death of the testator:

- (1) The value of a legal or equitable life estate for the life of the surviving spouse;

- (2) The value of the proceeds of an annuity for the life of the surviving spouse;
- (3) The value of proceeds of insurance policies on the life of the decedent received by the spouse;
- (4) The value of any property passing by survivorship, including real property owned by the decedent and surviving spouse as tenants by the entirety;
- (5) The value of the principal of a trust under the terms of which the surviving spouse holds a general power of appointment over the principal of the trust estate;

except that no property or interest in property shall be so included to the extent that the surviving spouse or another in his behalf either gave or donated it or paid or contributed to its purchase price.

(c) For the purpose of establishing the right of dissent, the estate of the deceased spouse and the property passing outside of the will to the surviving spouse as a result of the death of the testator shall be determined and valued as of the date of his death, which determination and value the executor or administrator with the will annexed and the surviving spouse are hereby authorized to establish by agreement subject to approval by the clerk of the superior court. If such personal representative and the surviving spouse do not so agree upon the determination and value, or if the surviving spouse is the personal representative, or if the clerk shall be of the opinion that the personal representative may not be able to represent the estate adversely to the surviving spouse, the clerk shall appoint one or more disinterested persons to make such determination and establish such value. Such determination and establishment of value made as herein authorized shall be final for determining the right of dissent and shall be used exclusively for this purpose. (1959, c. 880, s. 1; 1961, c. 959, s. 1; 1965, c. 849, s. 1.)

Editor's Note.—

Session Laws 1959, c. 880, s. 1, provides: "Chapter 30 of the General Statutes, entitled 'Widows,' is hereby redesignated 'Surviving Spouses,' and article 1 thereof is hereby rewritten."

Session Laws 1959, c. 880, s. 3 provides: "This act shall become effective on July 1, 1960, and shall be applicable only to estates of persons dying on or after July 1, 1960."

The 1961 amendment, effective July 1, 1961, rewrote this section.

Section 4.1 of Session Laws 1963, c. 1209, provides that from and after the certification of the amendment to § 6 of Article X of the Constitution which was proposed by c. 1209, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife. The approval of the amendment by vote of the people was certified by the Governor on February 6, 1964.

The 1965 amendment re-enacted this section without change. Section 2 of the amendatory act provides: "This re-enactment of G.S. 30-1, G.S. 30-2 and G.S. 30-3 shall not be construed as a legislative determination that, with respect to the right of a husband to dissent from his wife's will, these sections were invalid between the date of certification of the amendments

to Article X, § 6 and the date of ratification of this act. This intention is manifested by the following language of s. 4.1 of c. 1209 of the Session Laws of 1963: 'From and after the date of certification of the amendments set out in s. 1 of this act, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate succession, it shall apply alike to both husband and wife.'"

For note on constitutionality of husband's right to dissent from wife's will, see 41 N. C. Law Rev. 311.

For case law survey on devolution of property, see 41 N. C. Law Rev. 432.

Article Was Unconstitutional Insofar as it Authorized Dissent by Husband. — The provisions of this section and §§ 30-2 and 30-3, insofar as they gave a husband a right in certain cases to dissent from his deceased wife's will, and to take a specified share of his deceased wife's real and personal property, violated the former provisions of Const., Art. X, § 6, since they diminished a married woman's estate disposed of by her will, and restrict and abridge her constitutional power to dispose of her property by will as if she were unmarried. *Dudley v. Staton*, 257 N. C. 572, 126 S. E. (2d) 590 (1962), commented on in 41 N. C. Law Rev. 311 (1963), decided prior to the 1964 amendment to N.C. Const., Art. X, § 6.

Decision of Unconstitutionality Not Ground for Cancelling Agreement Based on Section.—An agreement between the widower and the beneficiaries in regard to the settlement of an estate and the deed and the consent judgment effectuating the agreement were made in reliance upon this section giving the husband the right to dissent from the will of his wife, there was no ground for the cancellation of the consent judgment and deed sequent to the declaration by the court of the unconstitutionality of this section. *Roberson v. Penland*, 260 N.C. 502, 133 S.E.2d 206 (1963).

This section confers no right of dower or year's support; these rights exist independently. *Overton v. Overton*, 259 N.C. 31, 129 S.E. (2d) 593 (1963). As to abolition of dower, see § 29-4.

Testator Presumed to Have Known of Widow's Right to Dissent.—In making a will a husband is presumed to have knowledge of and to have taken into consideration the statutory right of his widow to dissent from the will. *Keesler v. North Carolina Nat. Bank*, 256 N.C. 12, 122 S.E. (2d) 807 (1961).

Dissent Equivalent to Death.—Dissent of widow, so far as remaindermen are concerned, is equivalent to her death. *Keesler v. North Carolina Nat. Bank*, 256 N.C. 12, 122 S.E. (2d) 807 (1961).

Widow Has Six Months to Dissent.—This section allows a widow six months from the probate of the will of her husband within which to dissent. *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963).

Time Is to Enable Her to Reach Intelligent Conclusion.—Time is allowed by this section to enable the widow to make an examination into the value of the estate, the debts and liabilities, and for her to come to an intelligent conclusion as to the course she should pursue under all the circumstances that surround her. *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963).

§ 30-2. Time and manner of dissent.—(a) Any person entitled under the provisions of G.S. 30-1 to dissent from the will of his or her deceased spouse, may do so by filing such dissent with the clerk of the superior court of the county in which the will is probated, at any time within six months after the issuance of letters testamentary or of administration with the will annexed, or if litigation that affects the share of the surviving spouse is pending at the expiration of the time allowed for filing the dissent, then within such reasonable time as may be allowed by written order of the clerk of the superior court.

(b) The dissent shall be in writing signed and acknowledged by the surviving spouse or his or her duly authorized attorney; provided, however, if the surviving spouse is a minor or an incompetent, the dissent may be executed and filed by the general guardian, or by the guardian of the person or estate of the minor or incompetent spouse. If the minor or incompetent spouse has no guardian, the dissent

If She Offers Will and Is Appointed Executrix, She Cannot Resign and Dissent Unless Disqualified.—A widow who offers a will for probate and qualifies as executrix thereunder, and enters upon the duties of her office, or knowingly takes property thereunder, may not afterwards be allowed to resign and dissent from said will, unless it appears that such widow was at the time mentally and physically disqualified from attending to the business in hand or having any intelligent concept of what she was about. *Joyce v. Joyce*, 260 N.C. 757, 133 S.E.2d 675 (1963).

But Surviving Spouse Need Not Resign While Right Being Determined.—The personal representative need not resign from that position during the time the right to dissent is being determined. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

And Failure to Resign Is Not Waiver of Right to Dissent.—The failure of the surviving spouse to resign as personal representative during the time the right to dissent is determined under the provisions of this section, cannot constitute a waiver of the right to dissent. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

The right to dissent is limited to those cases in which provisions under the will, when added to the value of property passing outside the will as a result of the testator's death, (1) are less than the intestate share, or (2) are less than one half the net estate if neither lineal descendant nor parent survives. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

Method Is Provided for Determining Different Benefits.—Subsection (c) provides a method by which to determine the value of benefits under the will and the benefits in case of intestacy. *North Carolina Nat'l Bank v. Stone*, 263 N.C. 384, 139 S.E.2d 573 (1965).

may be executed and filed by a next friend appointed by the clerk of the superior court of the county in which the will is probated.

(c) The dissent, whether in person or by attorney, shall be filed as a record of the court.

(d) If no dissent is filed in the manner and within the time provided for in subsections (a), (b) and (c) of this section the surviving spouse shall be deemed to have waived his or her right to dissent. (1868-9, c. 93, s. 37; Code, s. 2108; Rev., s. 3080; C. S., s. 4096; 1959, c. 880, s. 1; 1961, c. 959, s. 2; 1965, c. 849, s. 1.)

Cross References.—

See note to § 30-1.

Editor's Note.—The 1961 amendment, effective July 1, 1961, rewrote this section.

The 1965 amendment re-enacted this section without change.

Some of the cases in the following note were decided under § 30-1 as it stood before the passage of the 1959 act which rewrote this article.

For note on dissent by incompetent widow through her guardian, see 35 N. C. Law Rev. 520.

Article Was Unconstitutional as Applied to Dissent by Husband.—See note to § 30-1.

This section is a statute of limitation, not an enabling statute. The period provided a widow to dissent from her husband's will is not a condition precedent to that right, but merely limits the time in which she may resort to the courts to enforce it. Whitted v. Wade, 247 N. C. 81, 100 S. E. (2d) 263 (1957).

This section is a statute of limitations. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

This section is a statute of limitations. It extinguishes no right but limits the time in which a widow may enforce the right the law gives her to participate in her husband's estate. First-Citizens Bank & Trust Co. v. Willis, 257 N. C. 59, 125 S. E. (2d) 359 (1962).

Failure to dissent within the time specified does not extinguish the right, it simply bars the action therefor. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963).

Dissent Not a Condition Precedent to Right to Dower.—Dissent within six months is not a condition precedent to the right of a widow, whose husband dies testate, to dower. Overton v. Overton, 259 N. C. 31, 129 S. E. (2d) 593 (1963). As to abolition of dower, see § 29-4.

Widow Must Comply with Section Although Will Gives Her Nothing.—Although a will gives a widow nothing, she is nevertheless required to comply with § 30-2. First-Citizens Bank & Trust Co. v. Willis, 257 N. C. 59, 125 S. E. (2d) 359 (1962).

Although an insane widow received

nothing in the will of her husband, the failure of her guardian to dissent for her within six months of his qualification barred her right of dissent at the end of that period. First-Citizens Bank & Trust Co. v. Willis, 257 N. C. 59, 125 S. E. (2d) 359 (1962).

An insane widow is not barred by the statute of limitations in this section, but may bring the action through a guardian as provided in this section within three years after the disability is removed pursuant to § 1-17. Whitted v. Wade, 247 N. C. 81, 100 S. E. (2d) 263 (1957), so holding though the guardian was not appointed until more than six months after the husband's will was proved.

Statute Runs against Insane Widow from Appointment of Guardian.—The statute of limitation provided in this section begins to run against an insane widow's right to dissent from the date a guardian is appointed. First-Citizens Bank & Trust Co. v. Willis, 257 N. C. 59, 125 S. E. (2d) 359 (1962).

Widow May Dissent without Assigning Reason.—The right of a widow to dissent from the will is given by law, and she may exercise such right within the time fixed by statute without assigning any reason therefor. Union Nat. Bank v. Easterby, 236 N. C. 599, 73 S. E. (2d) 541 (1952).

Dissent Based on Separate Agreement with Remaindermen.—The fact that the widow's unconditional dissent from the will and election to take her statutory rights is based upon separate agreement with the vested remaindermen that they pay her a specified sum, does not affect the validity of the dissent, the dissent being valid unless she is induced to dissent in ignorance of her rights to her prejudice. Union Nat. Bank v. Easterby, 236 N. C. 599, 73 S. E. (2d) 541 (1952).

Duty of Clerk to Record Dissent.—While the statute merely requires the filing of the dissent, it is the duty of the clerk to record the dissent when filed. Philbrick v. Young, 255 N. C. 737, 122 S. E. (2d) 725 (1961).

Effect of Recording.—This recording creates the presumption that the instrument was the act of the widow done in

the time and manner required by law. Philbrick v. Young, 255 N. C. 737, 122 S. E. (2d) 725 (1961).

Quoted in Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963).

Cited in Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 73 S. E. (2d) 879 (1952).

§ 30-3. Effect of dissent.—(a) Upon dissent as provided for in G.S. 30-2, the surviving spouse, except as provided in subsection (b) of this section, shall take the same share of the deceased spouse's real and personal property as if the deceased had died intestate; provided, that if the deceased spouse is not survived by a child, children, or any lineal descendants of a deceased child or children, or by a parent, the surviving spouse shall receive only one half of the deceased spouse's net estate as defined in G.S. 29-2 (3), which one half shall be estimated and determined before any federal estate tax is deducted or paid and shall be free and clear of such tax.

(b) Whenever the surviving spouse is a second or successive spouse, he or she shall take only one half of the amount provided by the Intestate Succession Act for the surviving spouse if the testator has surviving him lineal descendants by a former marriage but there are no lineal descendants surviving him by the second or successive marriage.

(c) If the surviving spouse dissents from his or her deceased spouse's will and takes an intestate share as provided herein, the residue of the testator's net estate, as defined in G.S. 29-2, shall be distributed to the other devisees and legatees as provided in the testator's last will, diminished pro rata unless the will otherwise provides. (R. C., c. 118, s. 12; 1868-9, c. 93, s. 38; Code, s. 2109; Rev., s. 3081; C. S., s. 4097; 1959, c. 880, s. 1; 1961, c. 959, s. 3; 1965, c. 849, s. 1.)

Cross Reference.—See note to § 30-1.

Editor's Note.—The 1961 amendment, effective July 1, 1961, pluralized descendant in line five, inserted "net" before "estate" in line seven and also inserted after "estate" the words and figures "as defined in G. S. 29-2 (3)."

The 1965 amendment re-enacted this section without change.

Most of the cases in the following note were decided under § 30-2 as it stood before the passage of the 1959 act which rewrote this article.

In General.—A widow having dissented from her husband's will is entitled to exactly the same share in his estate she would have received if he had died intestate. So far as her property rights in her husband's estate are concerned there is no will. In all other respects the will remains and the executors are controlled by its terms. Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 73 (2d) 879 (1953), commented on in 31 N. C. Law Rev. 491.

Article Was Unconstitutional as Applied to Dissent by Husband.—See note to § 30-1.

The effect of a widow's dissent is spelled out in subsections (a) and (b). Tolson v. Young, 260 N.C. 506, 133 S.E.2d 135 (1963).

Dissent Accelerates the Vesting of the Property.—Widow's dissent from will held to terminate her life estate thereunder and accelerate the vesting of remainder. Union

Nat. Bank v. Easterby, 236 N. C. 599, 73 S. E. (2d) 541 (1952).

Dissenting Widow May Not Assert Any Benefits under Will.—The widow's dissent from her husband's will is a rejection of it as far as her rights are concerned, and having elected to treat it as a nullity, she may not assert any benefits thereunder, even in regard to direction in the will for the payment of estate taxes. Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 73 S. E. (2d) 879 (1953), commented on in 31 N. C. Law Rev. 491.

Where a will directed that "all estate, inheritance or succession taxes of every kind which may be assessed against my estate or against any beneficiary thereunder in connection with my estate, shall be paid by my executors as debts of my estate, out of the general assets thereof, without diminishing any specific devise or bequest contained herein by reason hereof," testator's widow who dissented from the will could not bring herself within the classification of devisee or legatee under the will or become entitled to any right or benefit therein prescribed. Wachovia Bank & Trust Co. v. Green, 236 N. C. 654, 73 S. E. (2d) 879 (1953), commented on in 31 N. C. Law Rev. 491.

Property from Which General Legacies Come Is Asset Subject to Distribution to Widow.—When the property from which general legacies must come provides in-

come, it is a general asset of the estate subject to the payment of debts and disposition under the terms of the will and, where a widow dissents, is to be proportionately distributed to her under the applicable statute. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N. C. 255, 130 S. E. (2d) 387 (1963).

Meaning of Residue of Net Estate.—See note to § 29-2.

When Dissenting Widow Takes Share Free of Federal Estate Tax.—The only instance where a surviving wife is allowed to take her distributive share free and clear of the federal estate tax occurs when her husband dies testate, leaves no lineal descen-

dants or parents surviving him, and she dissents from his will. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963); *Adams v. Adams*, 261 N.C. 342, 134 S.E.2d 633 (1964).

A childless widow who dissents from the will of her husband who is survived also by one or more lineal descendants by a former marriage, takes her statutory share of the estate computed after the deduction of the federal estate taxes. *Tolson v. Young*, 260 N.C. 506, 133 S.E.2d 135 (1963).

Cited in *Wachovia Bank & Trust Co. v. Waddell*, 234 N. C. 454, 67 S. E. (2d) 651 (1951); *Gomer v. Askew*, 242 N. C. 547, 89 S. E. (2d) 117 (1955).

ARTICLE 2.

Dower.

§§ 30-4 to 30-8: Repealed by Session Laws 1959, c. 879, s. 14, effective July 1, 1960.

Cross Reference.—As to abolition of the estate of dower, see § 29-4.

§ 30-9: Repealed by Session Laws 1965, c. 853.

§ 30-10: Repealed by Session Laws 1959, c. 879, s. 14, effective July 1, 1960.

Editor's Note.—

The act repealing this section inserts

new chapter 29 entitled "Intestate Succession."

ARTICLE 3.

Allotment of Dower.

§§ 30-11 to 30-14: Repealed by Session Laws 1959, c. 879, s. 14, effective July 1, 1960.

Editor's Note.—The act repealing these sections inserts new chapter 29 entitled "Intestate Succession."

ARTICLE 4.

Year's Allowance.

Part 1. Nature of Allowance.

§ 30-15. When spouse entitled to allowance.—Every surviving spouse of an intestate or of a testator, whether or not he has dissented from the will, shall, unless he has forfeited his right thereto as provided by law, be entitled, out of the personal property of the deceased spouse, to an allowance of the value of one thousand dollars (\$1,000.00) for his support for one year after the death of the deceased spouse. Such allowance shall be exempt from any lien, by judgment or execution, acquired against the property of the deceased spouse, and shall, in cases of testacy, be charged against the share of the surviving spouse. (1868-9, c. 93, s. 81; 1871-2, c. 193, s. 44; 1880, c. 42; Code, s. 2116; 1889, c. 499, s. 2; Rev., s. 3091; C. S., s. 4108; 1953, c. 913, s. 1; 1961, c. 316, s. 1; c. 749, s. 1.)

Editor's Note. — The 1953 amendment increased the allowance from five hundred

to seven hundred fifty dollars.

The first 1961 amendment, effective Oct.

1, 1961, increased the allowance from "seven hundred fifty dollars" to "one thousand dollars." The second 1961 amendment, effective June 13, 1961, made the same increase of allowance, substituted "surviving spouse" for "widow" and made other changes.

For brief comment on the 1953 amendment, see 31 N.C. Law Rev. 376.

Purely Statutory Right.—

In accord with original. See *Jones v. Callahan*, 242 N.C. 566, 89 S.E. (2d) 111 (1955); *Overton v. Overton*, 259 N.C. 31, 129 S.E. (2d) 593 (1963).

If the wife dies intestate, the husband has the same right as a widow. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N.C. 255, 130 S.E. (2d) 387 (1963).

Under this section as rewritten, for the first time in our law a husband may be entitled to a year's allowance. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N.C. 255, 130 S.E. (2d) 387 (1963).

Mortgage Registered after Husband's Death.—

See *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E. (2d) 267 (1957).

§ 30-16. Duty of personal representative or justice to assign allowance.—It shall be the duty of every administrator, collector, or executor of a will, on application in writing, signed by the surviving spouse, at any time within one year after the death of the deceased spouse, to assign to the surviving spouse the year's allowance as provided in this article.

If there shall be no administration, or if the personal representative shall fail or refuse to apply to a justice of the peace, as provided in § 30-20, for ten days after the surviving spouse has filed the aforesaid application, or if the surviving spouse is the personal representative, the surviving spouse may make application to the justice, and it shall be the duty of the justice to proceed in the same manner as though the application had been made by the personal representative.

Where any personal property of the deceased spouse shall be located outside the township or county where the deceased spouse resided at the time of his death, the personal representative or the surviving spouse may apply to any justice of the peace of any township or county where such personal property is located, and it shall be the duty of such justice to assign the year's allowance as if the deceased spouse had resided and died in that township. (1868-9, c. 93, s. 12; 1870-1, c. 263; Code, ss. 2120, 2122; 1889, cc. 496, 531; 1891, c. 13; Rev., ss. 3096, 3098; C.S., ss. 4113, 4115; 1961, c. 749, s. 2.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow," referred to "this article" in stead of "this chapter" and made other changes.

§ 30-17. When children entitled to an allowance.—Whenever any parent dies leaving any child under the age of eighteen years, including an adopted child, or a child with whom the widow may be pregnant at the death of her husband, or any other person under the age of eighteen years residing with the deceased parent at the time of the death to whom the deceased parent or the surviving parent stood in loco parentis, every such child shall be entitled, besides

Where Widow Fails to Dissent, etc.—
In accord with original. See *Jones v. Callahan*, 242 N.C. 566, 89 S.E. (2d) 111 (1955).

Under this section as phrased prior to the 1961 revision, the time element in § 30-2 was a statute of limitations with respect to the rights of both dissent and year's support. *Overton v. Overton*, 259 N.C. 31, 129 S.E. (2d) 593 (1963).

A widow who has dissented from her husband's will takes her year's allowance in addition to her statutory share in his estate. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N.C. 255, 130 S.E. (2d) 387 (1963).

The phrase "and shall, in cases of testacy, be charged against the share of the surviving spouse," refers only to the share of a widow who takes in accordance with the will and has not dissented from it. *First Union Nat. Bank of North Carolina v. Melvin*, 259 N.C. 255, 130 S.E. (2d) 387 (1963).

Cited in *Gomer v. Askew*, 242 N.C. 547, 89 S.E. (2d) 117 (1955).

its share of the estate of such deceased parent, to an allowance of three hundred dollars (\$300.00) for its support for the year next ensuing the death of such parent, less, however, the value of any articles consumed by said child since the death of said parent. Such allowance shall be exempt from any lien, by judgment or execution against the property of such parent. The personal representative of the deceased parent, within one year after the parent's death, shall assign to every such child the allowance herein provided for; but if there is no personal representative or if he fails or refuses to act within ten days after written request by a guardian or next friend on behalf of such child, the allowance may be assigned by a justice of the peace, upon application of said guardian or next friend.

If the child resides with the widow of the deceased parent at the time such allowance is paid, the allowance shall be paid to said widow for the benefit of said child. If the child resides with its surviving parent who is other than the widow of the deceased parent, such allowance shall be paid to said surviving parent for the use and benefit of such child. Provided, however, the allowance shall not be available to an illegitimate child of a deceased father, unless such deceased father shall have recognized the paternity of such illegitimate child by deed, will or other paper-writing. If the child does not reside with a parent when the allowance is paid, it shall be paid to its general guardian, if any, and if none, to the clerk of the superior court who shall receive and disburse same for the benefit of such child (1889, c. 496; Rev., s. 3094; C. S., s. 4111; 1939, c. 396; 1953, c. 913, s. 2; 1961, c. 316, s. 2; c. 749, s. 3.)

Editor's Note. — The 1953 amendment increased the allowance from \$150.00 to \$250.00

The first 1961 amendment, effective Oct. 1, 1961, changed "fifteen" to "eighteen" in lines two and four of the first paragraph. It also changed the amount in line eight thereof from \$250.00 to \$300.00.

The second 1961 amendment deleted the word "distributive" formerly appearing immediately before "share" in line seven, and also the word "personal" formerly appearing immediately before "estate" in the same line.

§ 30-18. From what property allowance assigned. — Such allowance shall be made in money or other personal property of the estate of the deceased spouse. (1868-9, c. 93, s. 9; Code, s. 2117; Rev., s. 3095; C. S., s. 4112; 1925, c. 92; 1961, c. 749, s. 4.)

Editor's Note. — The 1961 amendment rewrote this section.

Part 2. Assigned by Justice of the Peace.

§ 30-19. Value of property ascertained. — The value of the personal property assigned to the surviving spouse and children shall be ascertained by a justice of the peace and two persons qualified to act as jurors of the county in which administration was granted or the will probated. (1868-9, c. 93, s. 13; Code, s. 2121; Rev., s. 3097; C. S., s. 4114; 1961, c. 749, s. 5.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow" and made other changes.

§ 30-20. Procedure for assignment. — Upon the application of the surviving spouse, or whenever it shall appear that a child is entitled to an allowance as provided by § 30-17, the personal representative of the deceased shall

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 376

The background and effect of this section, etc.—

This section, by its terms, its history, and when considered with the other provisions of this article, has reference only to the estate of an intestate or at most to an estate where the widow dissents from the will. Jones v. Callahan, 242 N. C. 566, 89 S. E. (2d) 111 (1955)

Cited in Gomer v. Askew, 242 N. C. 547, 89 S. E. (2d) 117 (1955).

apply to a justice of the peace of the township in which the deceased resided, or some other township, to summon two persons qualified to act as jurors, who, having been sworn by the justice to act impartially as commissioners shall, with him, ascertain the person or persons entitled to an allowance according to the provisions of this article, and determine the money or other personal property of the estate, and pay over to or assign to the surviving spouse and to the children, if any, so much thereof as they shall be entitled to as provided in this article. Any deficiencies shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient to satisfy such allowance, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1870-1, c. 263; Code, s. 2122; 1891, c. 13; 1899, c. 531; Rev., s. 3098; C. S., s. 4115; 1961, c. 749, s. 6.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow" and "article" for "chapter" and made other changes.

§ 30-21. Report of commissioners. — The commissioners shall make and sign three lists of the money or other personal property assigned to each person, stating their quantity and value, and the deficiency to be paid by the personal representative. Where the allowance is to the surviving spouse, one of these lists shall be delivered to him. Where the allowance is to a child, one of these lists shall be delivered to the surviving parent with whom the child is living; or to the child's guardian or next friend if the child is not living with said surviving parent; or to the child if said child is not living with the surviving parent and has no guardian or next friend. One list shall be delivered to the personal representative. One list shall be returned by the justice, within twenty days after the assignment, to the superior court of the county in which administration was granted or the will probated, and the clerk shall file and record the same, together with any judgment entered pursuant to § 30-20. (1868-9, c. 93, s. 15; Code, s. 2123; Rev., s. 3099; C. S., s. 4116; 1961, c. 749, s. 7.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow" and made other changes.

§ 30-22. Fees of commissioners. — Any person appointed by any justice of the peace to allot or set apart to any surviving spouse or child a year's allowance under the statute, and who shall serve, shall be paid the sum of one dollar (\$1.00) a day or fraction of a day engaged, and the same shall be taxed as a part of the bill of costs of the proceeding. (1907, c. 223; 1913, c. 18; C. S., s. 3900; 1961, c. 749, s. 8.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow" in line two.

§ 30-23. Right of appeal. — The personal representative, or the surviving spouse, or child by his guardian or next friend, or any creditor, legatee or heir of the deceased, may appeal from the finding of the commissioners to the superior court of the county, and, within ten days after the assignment, cite the adverse party to appear before such court on a certain day, not less than five nor exceeding ten days after the service of the citation. (1868-9, c. 93, s. 16; Code, s. 2124; 1897, c. 442; Rev., s. 3100; C. S., s. 4117; 1961, c. 749, s. 9.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow" and "heir" for "distributee."

§ 30-26. When above allowance is in full. — If the estate of a deceased be insolvent, or if his personal estate does not exceed two thousand dollars (\$2,000.00), the allowances for the year's support of the surviving spouse and the

children shall not, in any case, exceed the value prescribed in G. S. 30-15 and 30-17; and the allowances made to them as above prescribed shall preclude them from any further allowances. (1868-9, c. 93, s. 19; Code, s. 2127; Rev., s. 3103; C. S., s. 4120; 1961, c. 749, s. 10.)

Editor's Note. — The 1961 amendment substituted "the surviving spouse" for "his widow." It also changed "above" to read "in G. S. 30-15 and 30-17."

Part 3. Assigned in Superior Court.

§ 30-27. Surviving spouse or child may apply to superior court. — It shall not, however, be obligatory on a surviving spouse or child to have the support assigned as above prescribed. Without application to the personal representative, the surviving spouse, or the child through his guardian or next friend, may at any time within one year after the decedent's death, apply to the superior court of the county in which administration was granted or the will probated to have a year's support assigned. (1868-9, c. 93, s. 20; Code, s. 2128; Rev., s. 3104; C. S., s. 4121; 1961, c. 749, s. 11.)

Editor's Note. — The 1961 amendment substituted "surviving spouse" for "widow" and inserted the words "or the will probated" near the end of the section.

Approval of Allowance Less than Maximum under § 30-31. — Where the superior court found a sum which a widow has agreed to accept to be reasonable and

proper, though less than her maximum allowance would have been if calculated under § 30-31, this section gives the court the jurisdiction to make the allowance agreed upon. *Wachovia Bank & Trust Co. v. Waddell*, 234 N. C. 454, 67 S. E. (2d) 651 (1951).

§ 30-29. What complaint must show. — In the complaint the plaintiff shall set forth, besides the facts entitling plaintiff to a year's support and the value of the support claimed, the further facts that the estate of the decedent is not insolvent, and that the personal estate of which he died possessed exceeded two thousand dollars, and also whether or not an allowance has been made to plaintiff and the nature and value thereof. (1868-9, c. 93, s. 22; Code, s. 2130; Rev., s. 3106; C. S., s. 4123; 1961, c. 749, s. 12.)

Editor's Note. — The 1961 amendment deleted "and if no allowance has been made, the quantities and values of the articles consumed by plaintiff since the death of decedent" formerly appearing at the end of the section.

§ 30-30. Judgment and order for commissioners. — If the material allegations of the complaint be found true, the judgment shall be that plaintiff is entitled to the relief sought; and the court shall thereupon issue an order to the sheriff or other proper officer of the county, commanding him to summon a justice of the peace and two persons qualified to act as jurors, who shall determine the money or other personal property of the estate and assign to the plaintiff a sufficiency thereof for plaintiff's support for one year from the decedent's death. Any deficiency shall be made up from any of the personal property of the deceased, and if the personal property of the estate shall be insufficient for such support, the clerk of the superior court shall enter judgment against the personal representative for the amount of such deficiency, to be paid when a sufficiency of such assets shall come into his hands. (1868-9, c. 93, s. 23; Code, s. 2131; Rev., s. 3107; C. S., s. 4124; 1961, c. 749, s. 13.)

Editor's Note. — The 1961 amendment rewrote this section.

§ 30-31. Duty of commissioners: amount of allowance.

Cross Reference. — As to jurisdiction of superior court to approve allowance less than maximum allowed under this section, see note to § 30-27.

Chapter 31.

Wills.

Article 1.

Execution of Will.

Sec.

- 31-1 Who may make will.
- 31-2 [Repealed.]
- 31-3 [Rewritten and renumbered.]
- 31-3.1 Will invalid unless statutory requirements complied with.
- 31-3.2 Kinds of wills
- 31-3.3 Attested written will.
- 31-3.4 Holographic will.
- 31-3.5 Nuncupative will.
- 31-3.6 Seal not required.

Article 2.

Revocation of Will.

- 31-5. [Rewritten and renumbered]
- 31-5.1 Revocation of written will
- 31-5.2 Revocation of nuncupative will.
- 31-5.3 Revocation by marriage; exceptions
- 31-5.4 Revocation by divorce.
- 31-5.5 After-born or after-adopted child; effect on will
- 31-5.6 No revocation by subsequent conveyance.
- 31-5.7 Specific provisions for revocation exclusive; effect of changes in circumstances
- 31-5.8 Revival of revoked will.
- 31-6 [Renumbered.]
- 31-7 [Repealed.]
- 31-8. [Renumbered]

Article 3.

Witnesses to Will.

- 31-8.1 Who may witness.

Sec.

- 31-10. Beneficiary competent witness; when interest rendered void.

Article 5.

Probate of Will.

- 31-18. [Rewritten and renumbered]
- 31-18.1 Manner of probate of attested written will.
- 31-18.2 Manner of probate of holographic will
- 31-18.3 Manner of probate of nuncupative will
- 31-18.4 Probate of wills of members of the armed forces.
- 31-26 [Renumbered.]
- 31-31.2 Validation of wills when recorded without order of probate or registration upon oath and examination of subscribing witness or witnesses.

Article 7.

Construction of Will.

- 31-42. Failure of devises and legacies by lapse or otherwise.
- 31-42.1, 31-42.2. [Repealed.]
- 31-44. [Repealed.]
- 31-45 [Rewritten and renumbered]
- 31-46. Validity of will; which laws govern.

Article 8.

Devise or Bequest to Trustee of an Existing Trust.

- 31-47. Devise or bequest to trustee of an existing trust.

ARTICLE 1.

Execution of Will.

§ 31-1. Who may make will.—Any person of sound mind, and 21 years of age or over, or married and of sound mind and 18 years of age or over, may make a will. (1811, c. 280; R. C., c. 119, s. 2; Code, s. 2137; Rev., s. 3111; C. S., s. 4128; 1953, c. 1098, s. 1; 1965, c. 303.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953 rewrote this section, which formerly related only to the incapacity of infants. The amendatory act which changed this and other sections relating to wills in section 16 provides "This act does not have the effect of rendering invalid any will executed or probated prior to July 1

1953."

Section 4.1 of Session Laws 1963, c. 1209, provides that from and after the certification of the amendment to § 6 of Article X of the Constitution which was proposed by c. 1209, wherever the word "spouse" appears in the General Statutes with reference to testate or intestate successions, it shall apply alike to both husband and wife. The

approval of the amendment by vote of the people was certified by the Governor on February 6, 1964.

The 1965 amendment substituted "or married and of sound mind and 18 years of age or over" for "including a married woman."

For comment on the 1953 amendments to this chapter, see 31 N. C. Law Rev. 444. For article on medication as a threat to testamentary capacity, see 35 N. C. Law Rev. 380.

For case law survey on wills and administration, see 41 N. C. Law Rev. 530.

Burden of Proving Mental Capacity.— "Wherever one alleges that the maker of a will did not have sufficient mental capacity to make it, then the burden is upon such person to satisfy the jury by the greater weight of the evidence of the truth of his contention and to overcome the presumption of sanity after the formal execution has been established." *In re Pridgen's Will*, 249 N. C. 509, 107 S. E. (2d) 160 (1959).

Instruction as to Mental Capacity.— When the court in its charge stated the rule to measure mental capacity in this language: "It is your duty in passing on the mental capacity of M. W. Pridgen to determine with reference to the will in controversy whether when he signed same he had such mental capacity as enabled him to understand the provisions contained in the paper, the extent of the same, and to know that he was giving the property therein bequeathed or devised to the person named therein and that he desired her to have it as written in the paper, to know his relatives and to know and realize that it was his free will and desire that his relatives should not have any property of his other than in the manner devised, or that devised," it was in substance if not verbatim the rule as stated in numerous decisions by the Supreme Court. *In re Pridgen's Will*, 249 N. C. 509, 107 S. E. (2d) 160 (1959).

Cited in *McCraw v. Llewellyn*, 256 N. C. 213, 123 S. E. (2d) 575 (1962).

§ 31-2: Repealed by Session Laws 1953, c. 1098, s. 1.

Editor's Note.—The repealing act became effective July 1, 1953. See note to § 31-1.

§ 31-3: Rewritten and renumbered as §§ 31-3.1 to 31-3.6 by Session Laws 1953, c. 1098, s. 2.

§ 31-3.1. Will invalid unless statutory requirements complied with.—No will is valid unless it complies with the requirements prescribed therefor by this article. (1953, c. 1098, s. 2.)

Editor's Note.—Former § 31-3 was rewritten by Session Laws 1953, c. 1098, s. 2, effective July 1, 1953, to appear as §§ 31-3.1 to 31-3.6. See note to § 31-1.

Compliance with Statutory Requirements.—See *Morris v. Morris*, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

§ 31-3.2. Kinds of wills.—(a) Personal property may be bequeathed and real property may be devised by

- (1) An attested written will which complies with the requirements of G. S. 31-3.3, or
- (2) A holographic will which complies with the requirements of G. S. 31-3.4.
- (b) Personal property may also be bequeathed by a nuncupative will which complies with the requirements of G. S. 31-3.5. (1953, c. 1098, s. 2.)

Cross Reference.—See note to § 31-3.1.

§ 31-3.3. Attested written will.—(a) An attested written will is a written will signed by the testator and attested by at least two competent witnesses as provided by this section.

(b) The testator must, with intent to sign the will, do so by signing the will himself or by having someone else in the testator's presence and at his direction sign the testator's name thereon

(c) The testator must signify to the attesting witnesses that the instrument is his instrument by signing it in their presence or by acknowledging to them his signature previously affixed thereto, either of which may be done before the attesting witnesses separately.

(d) The attesting witnesses must sign the will in the presence of the testator but need not sign in the presence of each other. (1953, c. 1098, s. 2.)

Cross Reference.—See note to § 31-3.1.

In General.—In order to prove the formal execution of a will by subscribing witnesses, as required by this section, it must appear that the will was signed by the testator or some other person in his presence and by his direction, and subscribed in his presence by at least two witnesses and when the testator does not sign the will in the presence of the witnesses, the signature should be acknowledged by him. *In re Will of Franks*, 231 N. C. 252, 56 S. E. (2d) 668 (1949). See *In re Morrow's Will*, 234 N. C. 365, 67 S. E. (2d) 279 (1951).

Distinction between Signing and Subscribing. — The authorities make a distinction between statutes requiring instruments to be signed and those requiring them to be subscribed, holding with practical unanimity in reference to the first class, that it is not necessary for the name to appear on any particular part of the instrument, if written with the intent to become bound; and, as to the second class, that the name must be at the end of the instrument. *In re Williams' Will*, 234 N. C. 228, 66 S. E. (2d) 902 (1951), commented on in 30 N. C. Law Rev. 201.

The North Carolina statutes have never required a testator to subscribe his signature to his will. *Yount v. Yount*, 258 N. C. 236, 128 S. E. (2d) 613 (1962).

Name of Testator May Be Signed by Another.—That the name of the testator may be signed to the paper writing by some other person in his presence and by his direction is expressly authorized by the statute. *In re Williams' Will*, 234 N. C. 228, 66 S. E. (2d) 902 (1951), commented on in 30 N. C. Law Rev. 201.

Where a will is written on two or more separate sheets, the statute does not require that they be physically attached or that the signature of the testator appear on each sheet. It is sufficient if the signature of the testator appears in any part of the will. *In re Roberts' Will*, 251 N. C. 708, 112 S. E. (2d) 505 (1960); *In re Sessions' Will*, 254 N. C. 369, 119 S. E. (2d) 193 (1961).

Signing in Presence of Witnesses Not Necessary.—It is not necessary that testator sign his will in the presence of the attesting witnesses, but if he does not do so he must acknowledge his signature

either by acts or conduct. *In re Will of Franks*, 231 N. C. 252, 56 S. E. (2d) 668 (1949).

Witnesses Need Not Sign in Presence of Each Other.—See *In re Will of Franks*, 231 N. C. 252, 56 S. E. (2d) 668 (1949).

Witnesses are not required to sign in the presence of each other; only in the presence of the testator. *In re Long's Will*, 257 N. C. 598, 126 S. E. (2d) 313 (1962).

Where the judge told the jury that if the signatures of the witnesses "were subscribed thereto at the request of the testator and in his presence and in the presence of each other" they would answer the issue of execution of the will "Yes," this was error, and a new trial was required even though all the evidence tended to show that the witnesses did sign in the presence of each other. *In re Long's Will*, 257 N. C. 598, 126 S. E. (2d) 313 (1962).

Signing in Presence of Testator.—If the subscribing witnesses signed a will in a room adjacent to the room in which testator was lying in bed, but the testator was in a position where he did see or could have seen them subscribe their names, the attestation was in compliance with law. *In re Pridgen's Will*, 249 N. C. 509, 107 S. E. (2d) 160 (1959).

Testimony Showing Formal Execution of Will.—Testimony of one subscribing witness to the effect that he signed the instrument at the request of testator simultaneously with the testator, and testimony of the other that when he signed same it had already been signed by testator, together with testimony that testator stated to the witnesses that the instrument was his will and requested them to sign same, was held sufficient to show formal execution of the will and to support the charge of the court hereon. *In re Will of Franks*, 231 N. C. 252, 56 S. E. (2d) 668 (1949).

Applied in *In re Crawford's Will*. 246 N. C. 322, 98 S. E. (2d) 29 (1957); *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Cited in *Matter of Covington's Will*. 252 N. C. 546, 114 S. E. (2d) 257 (1960); *In re Will of Gilkey*, 256 N. C. 415, 124 S. E. (2d) 155 (1962).

§ 31-3.4. Holographic will.—(a) A holographic will is a will

(1) Written entirely in the handwriting of the testator but when all the words appearing on a paper in the handwriting of the testator are sufficient to consti-

tute a valid holographic will, the fact that other words or printed matter appear thereon not in the handwriting of the testator, and not affecting the meaning of the words in such handwriting, shall not affect the validity of the will, and

(2) Subscribed by the testator, or with his name written in or on the will in his own handwriting, and

(3) Found after the testator's death among his valuable papers or effects, or in a safe deposit box or other safe place where it was deposited by him or under his authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by him or under his authority for safekeeping.

(b) No attesting witness to a holographic will is required. (1953, c. 1098, s. 2; 1955, c. 73, s. 1.)

Cross Reference.—See note to § 31-3.1.

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote paragraph (1) of subsection (a).

For brief comment on the 1955 amendment, see 23 N. C. Law Rev. 597. For case law survey on holographic wills, see 41 N. C. Law Rev. 535.

Legislative History of Section.—See *In re Will of Gilkey*, 256 N. C. 415, 124 S. E. (2d) 155 (1962).

It is not required that a holographic will be dated or the place of its execution stated therein. *Pounds v. Litaker*, 235 N. C. 746, 71 S. E. (2d) 39 (1952).

It is necessary that the testator's name be inserted in his own handwriting in some part of the instrument. *Pounds v. Litaker*, 235 N. C. 746, 71 S. E. (2d) 39 (1952).

But Signature Need Not Be Witnessed.—It is not necessary that the testator's signature be witnessed if the requirements for a holographic will are established. *In re Will of Gilkey*, 256 N. C. 415, 124 S. E. (2d) 155 (1962).

Engraved Monogram of Testatrix Not Construed as Signature.—An engraved monogram of a testatrix, appearing on the instrument offered for probate in solemn form as a holographic will, may not be considered as a part thereof. The monogram is not in her handwriting and may not be construed to be her signature. *Pounds v. Litaker*, 235 N. C. 746, 71 S. E. (2d) 39 (1952).

§ 31-3.5. Nuncupative will.—A nuncupative will is a will

(1) Made orally by a person who is in his last sickness or in imminent peril of death and who does not survive such sickness or imminent peril, and

(2) Declared to be his will before two competent witnesses simultaneously present at the making thereof and specially requested by him to bear witness thereto. (1953, c. 1098, s. 2.)

Cross Reference.—See note to § 31-3.1.

§ 31-3.6. Seal not required.—A seal is not necessary to the validity of a will. (1953, c. 1098, s. 2.)

Cross Reference.—See note to § 31-3.1.

ARTICLE 2.

Revocation of Will.

§ 31-5: Rewritten and renumbered as § 31-5.1 by Session Laws 1953, c. 1098, s. 3.

§ 31-5.1. Revocation of written will.—A written will, or any part thereof, may be revoked only

(1) By a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills, or

(2) By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another person in his presence and by his direction. (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62, R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133, 1945, c. 140, 1953, c. 1098, s. 3.)

Editor's Note. — Former § 31-5 was rewritten by Session Laws 1953, c. 1098, s. 3, effective July 1, 1953, to appear as this section. See note to § 31-1.

One lacking testamentary capacity is not competent to revoke a prior will. The same degree of mental capacity is necessary to revoke a will as to make one. *In re Shute's Will*, 251 N. C. 697, 111 S. E. (2d) 851 (1960).

Revocation by Codicil Not Containing Express Words of Revocation.—In the absence of express words of revocation, it is a rule of construction that for a codicil to revoke any part of a will its provisions must be so inconsistent with those of the will as to exclude any other legitimate inference than that the testator had changed his intentions. *Yount v. Yount*, 258 N. C. 236, 128 S. E. (2d) 613 (1962).

Instruction Held Without Error.—See

§ 31-5.2. Revocation of nuncupative will.—A nuncupative will or any part thereof may be revoked

(1) By a subsequent nuncupative will, or

(2) By a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills. (1953, c. 1098, s. 4)

Editor's Note. — The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-5.3. Revocation by marriage; exceptions.—A will is revoked by the subsequent marriage of the maker, except as follows

(1) A will made prior to the marriage of the maker which contains an express statement to the effect that it is made in contemplation of marriage to a person named therein is not revoked by the maker's marriage to such person.

(2) A will made in the exercise of a power of appointment, or so much thereof as is made in the exercise of a power of appointment, if the real or personal estate thereby appointed would not, in default of such appointment, pass to the maker's heirs or next of kin, is not revoked by the maker's subsequent marriage. (1844 c. 88, s. 10, R. C., c. 119, s. 23; Code, s. 2177; Rev., s. 3116, C. S., s. 4134; 1947, c. 110; 1953, c. 1098, s. 5.)

In re Gatling's Will, 234 N. C. 581, 68 S. E. (2d) 301 (1951)

Evidence of the preparation of a later dispositive instrument, without evidence that it was ever executed according to the formalities necessary to make it a valid will and without evidence that it contained any words of revocation or provisions contrary to a prior will, duly executed, is insufficient evidence of revocation of the will to justify the submission of the question of revocation to the jury. *In re Crawford's Will*, 246 N. C. 322, 98 S. E. (2d) 29 (1957).

To establish the revocation of a will by a subsequent writing it is necessary to prove the revocation in the manner required to establish the validity of the paper writing originally offered for probate. *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Editor's Note. — The 1953 amendment, effective July 1, 1953, renumbered § 31-6 to appear as this section.

The object of this section is set out as plainly as language can do it. It provides that a person's subsequent marriage ipso facto, with certain exceptions, revokes all prior wills made by such person. It does not provide for any partial revocation. *In re Tenner's Will*, 248 N. C. 72, 102 S. E. (2d) 391 (1958).

Marriage Revokes Will in Toto. — In those instances not coming within the ex-

§ 31-5.4. Revocation by divorce. — Dissolution of marriage by absolute divorce after making a will does not revoke the will of any testator but it revokes all provisions in the will in favor of the testator's spouse so divorced, including, but not by way of limitation, the appointment of such spouse as executor or executrix (1953, c. 1098, s. 6.)

Editor's Note. — The act inserting this section became effective July 1, 1953. See note to § 31-1.

"Divorce" Is Used in General and Comprehensive Sense. — In enacting this section the General Assembly used the word 'di-

vorce' in its general and comprehensive sense, that is, as denoting a judgment or decree by which a marriage is dissolved or annulled, rather than in its limited and technical sense. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

§ 31-5.5. After-born or after adopted child; effect on will. — (a) A will shall not be revoked by the birth of a child to or adoption of a child by the testator after the execution of the will, but any such after-born or after-adopted child shall be entitled to such share in testator's estate as it would be entitled to if the testator had died intestate unless.

(1) The testator made some provision in the will for the child, whether adequate or not, or

(2) It is apparent from the will itself that the testator intentionally did not make specific provision therein for the child

(b) The provisions of G. S. 28-153 to 28-158 inclusive shall be construed as applicable to both an after-born child and an after-adopted child. (1808-9, c. 113, s. 62, Code, s. 2145; Rev., s. 3145; C. S., s. 4169; 1953, c. 1098, s. 7; 1955, c. 541.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote former § 31-45 to appear as this section. See note to § 31-1.

The 1955 amendment, effective July 1, 1955, also rewrote this section.

For comment on sufficiency of life insurance as provision for after-born child, see 29 N. C. Law Rev. 218. For note on the inheritance rights of an after-adopted child, see 30 N. C. Law Rev. 276. For article on interstate and foreign adoptions in North Carolina, see 40 N. C. Law Rev. 691.

After-Born Child Takes Share Unless Provided for or Intentionally Excluded. — A child born after a will is executed takes as in case of intestacy, unless (1) provision is made for it in the will, or (2) it appears from the will itself that the testator's failure to make provision was intentional. Wa-

chovia Bank & Trust Co. v. McKee, 260 N.C. 416, 132 S.E.2d 762 (1963).

Will Is Only Source of Intent to Exclude. — The court is limited to the will as the source from which intent to exclude must appear. Wachovia Bank & Trust Co. v. McKee, 260 N.C. 416, 132 S.E.2d 762 (1963).

Intent to Exclude Is Not Shown by Will Ignoring All Children. — Where after-born children, in fact all children, are ignored in a will, the court cannot say the will discloses an intent to exclude after born children. It is limited to the will as the source from which intent to exclude must appear. Since such intent does not appear from the will, the after-born children of the testator take as in case of their father's intestacy. Wachovia Bank & Trust Co. v. McKee, 260 N.C. 416, 132 S.E.2d 762 (1963).

After-Born Child of Intestate Shares in

Estate.—This statutory provision clearly assumes and contemplates that an after-born child of an intestate shares in the estate, both real and personal, of such intestate. *Byerly v. Tolbert*, 250 N. C. 27, 108 S. E. (2d) 29 (1959).

A posthumous child was provided for under her father's will, though no direct, specific provision was made, where by the residuary clause the will made substantial provision for a class to which the posthumous child was a member. *Sheppard v. Kennedy*, 242 N. C. 529, 88 S. E. (2d) 760 (1955).

Child Born after Execution of Will but before Execution of Codicil.—A codicil operates as a republication of the original will and makes it speak as of the date of the execution of the codicil in so far as it is not altered or revoked by the codicil, and therefore a child born after the execution of the will, but before the execution of the codicil, is not entitled to such share in the estate as though testator had died intestate, it being apparent that testator intentionally did not make specific provision for such child. *Young v. Williams*, 253 N. C. 281, 116 S. E. (2d) 778 (1960).

§ 31-5.6. No revocation by subsequent conveyance.—No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (1844, c. 88, s. 2; R. C., c. 119, s. 25; Code, s. 2179; Rev., s. 3118; C. S., s. 4136; 1953, c. 1098, s. 8.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, renumbered § 31-8 to appear as this section.

§ 31-5.7. Specific provisions for revocation exclusive; effect of changes in circumstances.—No will can be revoked in whole or in part by any act of the testator or by a change in his circumstances or condition except as provided by G. S. 31-5.1 through 31-5.6 inclusive. (1953, c. 1098, s. 9.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-5.8. Revival of revoked will.—No will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a re-execution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference. (1953, c. 1098, s. 10.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-6: Renumbered as § 31-5.3 by Session Laws 1953, c. 1098, s. 5.

§ 31-7: Repealed by Session Laws 1953, c. 1098, s. 9.

Editor's Note.—The repealing act became effective July 1, 1953. See note to § 31-1.

§ 31-8: Renumbered as § 31-5.6 by Session Laws 1953, c. 1098, s. 8.

Adequacy of Provision for After-Born Child.—While the courts will not inquire into the adequacy of provision made for a child born after the execution of the will within the purport of this section such provision must be of reasonable substance and value in *praesenti*. *Williamson v. Williamson*, 232 N. C. 54, 59 S. E. (2d) 214 (1950).

Procurement of Insurance.—Testator had two children, one born before and one after the execution of his will. No testamentary provision was made for either child, but testator, after the birth of the second child, procured a policy of life and accident insurance on his life, making both the children beneficiaries therein. It was held that the procurement of the policy was not such a provision for the after-born child as to prevent such child from participating in his father's property as heir and distributee. *Williamson v. Williamson*, 232 N. C. 54, 59 S. E. (2d) 214 (1950).

Applied in *Johnson v. Johnson*, 256 N. C. 485, 124 S. E. (2d) 172 (1962); *Scott v. Jackson*, 257 N. C. 658, 127 S. E. (2d) 234 (1962).

§ 31-5.6. No revocation by subsequent conveyance.—No conveyance or other act made or done subsequently to the execution of a will of, or relating to, any real or personal estate therein comprised, except an act by which such will shall be duly revoked, shall prevent the operation of the will with respect to any estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death. (1844, c. 88, s. 2; R. C., c. 119, s. 25; Code, s. 2179; Rev., s. 3118; C. S., s. 4136; 1953, c. 1098, s. 8.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-5.7. Specific provisions for revocation exclusive; effect of changes in circumstances.—No will can be revoked in whole or in part by any act of the testator or by a change in his circumstances or condition except as provided by G. S. 31-5.1 through 31-5.6 inclusive. (1953, c. 1098, s. 9.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-5.8. Revival of revoked will.—No will or any part thereof, which shall be in any manner revoked, can be revived otherwise than by a re-execution thereof, or by the execution of another will in which the revoked will or part thereof is incorporated by reference. (1953, c. 1098, s. 10.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-6: Renumbered as § 31-5.3 by Session Laws 1953, c. 1098, s. 5.

§ 31-7: Repealed by Session Laws 1953, c. 1098, s. 9.

Editor's Note.—The repealing act became effective July 1, 1953. See note to § 31-1.

§ 31-8: Renumbered as § 31-5.6 by Session Laws 1953, c. 1098, s. 8.

ARTICLE 3.

Witnesses to Will.

§ 31-8.1. Who may witness.—Any person competent to be a witness generally in this State may act as a witness to a will. (1953, c. 1098, s. 15.)

Editor's Note.—The act inserting this section became effective July 1, 1953. See note to § 31-1.

§ 31-10. Beneficiary competent witness; when interest rendered void.—(a) A witness to an attested written or a nuncupative will, to whom or to whose spouse a beneficial interest in property, or a power of appointment with respect thereto, is given by the will, is nevertheless a competent witness to the will and is competent to prove the execution or validity thereof. However, if there are not at least two other witnesses to the will who are disinterested, the interested witness and his spouse and any one claiming under him shall take nothing under the will, and so far only as their interests are concerned the will is void.

(b) A beneficiary under a holographic will may testify to such competent, relevant and material facts as tend to establish such holographic will as a valid will without rendering void the benefits to be received by him thereunder. (R. C., c. 119, s. 10; Code, s. 2147; Rev., s. 3120; C. S., s. 4138; 1953, c. 1098, s. 11; 1955, c. 73, s. 2.)

Editor's Note.—The 1953 amendment, effective July 1, 1953, rewrote this section. See note to § 31-1.

The 1955 amendment, effective July 1, 1955, designated the former statute as subsection (a) and added subsection (b).

Legacy Void under This Section In-

cluded in Residuary Legacy.—See annotations to § 31-42.

Applied in *In re Crawford's Will*, 246 N. C. 322, 98 S. E. (2d) 29 (1957); *Brown v. Byrd*, 252 N. C. 454, 113 S. E. (2d) 804 (1960).

ARTICLE 4.

Depository for Wills.

§ 31-11. Depositories in offices of clerks of superior court where living persons may file wills.

Testator Entitled to Inspect Will.—In a proceeding by petitioner to inquire into the mental state of respondent, his aged uncle, and to have a trustee appointed for him, the petitioner testified in substance that he was only interested in the welfare of respondent. It was held that respondent was entitled to examine his own will which had been deposited in a sealed envelope with the court clerk for the purpose of showing that petitioner

was the principal devisee under the will. *In re Gamble*, 244 N. C. 149, 93 S. E. (2d) 66 (1956).

Without Written Request.—Provision of this section requiring written request of testator for permission to withdraw will from depository or receptacle does not apply to his request for inspection of will. *In re Gamble*, 244 N. C. 149, 93 S. E. (2d) 66 (1956).

ARTICLE 5.

Probate of Will.

§ 31-12. Executor may apply for probate; jurisdiction when clerk interested party.—Any executor named in a will may, at any time after the death of the testator, apply to the clerk of the superior court, having jurisdiction, to have the same admitted to probate. Such will shall not be valid or effective to pass real estate or personal property as against innocent purchasers for value and without notice, unless it is probated or offered for probate within two years

after the death of the testator or devisor or prior to the time of approval of the final account of a duly appointed administrator of the estate of the deceased, whichever time is earlier. If such will is fraudulently suppressed, stolen or destroyed, or has been lost, and an action or proceeding shall be commenced within two years from the death of the testator or devisor to obtain said will or establish the same as provided by law, then the limitation herein set out shall only begin to run from the termination of said action or proceeding, but not otherwise. If the clerk of the superior court having jurisdiction to probate any will be a subscribing witness thereto or a devisee or legatee therein, or if said clerk shall have any pecuniary interest in the property disposed of by said will, then the clerk of the superior court of any adjoining county shall have jurisdiction to probate said will, and upon petition filed before him by anyone interested in any way in said will, he shall proceed to have said will produced before him, and the said will shall thereupon be probated, recorded, and filed as provided by this chapter, and a duly certified copy of the said will, together with the probate of the same, and the said petition, under the hand and seal of the said clerk shall be filed and recorded in the book of wills, in the office of the clerk of the superior court of the county whose clerk was a subscribing witness thereto, or a devisee or legatee therein, or who had a pecuniary interest in the property disposed of by said will and the clerk in said last mentioned county is hereby authorized to issue letters to personal representatives, who may qualify and administer the estate in said will as if originally probated in said county, and the title to all property, both real and personal, conveyed and devised in said will shall be as good and effectual as if the said will had been originally probated and recorded in said last mentioned county. (C. C. P., s. 439; Code, s. 2151; Rev., s. 3122; 1919, c. 15; C. S., s. 4139; 1921, c. 99; 1923, c. 14; 1953, c. 920, s. 2.)

Editor's Note.—

The 1953 amendment rewrote the second sentence of this section. Section 4 of the amendatory act provided that it should not apply to the estate of any decedent dying prior to April 23, 1953.

For note on "Two Methods of Probate in Solemn Form in North Carolina," see 30 N. C. Law Rev. 470. For note as to procedure for probate upon death of survivor of testators of joint will, see 35 N. C. Law Rev. 345.

The word "probate" when used in reference to a document purporting to be a will means the judicial process by which a court of competent jurisdiction in a duly constituted proceeding tests the validity of the instrument before the court, and ascertains whether or not it is the last will of the deceased. *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

It is the duty of a person named as executor to apply to the court having jurisdiction to have the writing probated.

§ 31-13. Executor failing, beneficiary may apply.

Presenting for Probate Merely to Secure Adjudication of Invalidity — This section permits a person interested in the estate of a supposed testator to present an alleged will for probate merely for the purpose of obtaining an adjudication of its invalidity. *Brissie v. Craig*, 232 N. C. 701, 62 S. E.

In re Marks' Will, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Jurisdiction of Clerk.—This section confers upon the clerk of the superior court exclusive and original jurisdiction of proceedings for the probate of wills. *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330 (1950); *Morris v. Morris*, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

Citation to Those in Interest Is Not Necessary, etc.—

See *In re Will of Etheridge*, 231 N. C. 502, 57 S. E. (2d) 768 (1950).

The probate of a will in common form without citation to those in interest "to see the proceedings" is not competent as evidence of its validity on an issue of *deviseavit vel non* raised by a caveat filed to said will. *In re Will of Etheridge*, 231 N. C. 502, 57 S. E. (2d) 768 (1950).

Cited in *In re Will of Wood*, 240 N. C. 134, 81 S. E. (2d) 127 (1954); *In re Covington's Will*, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

(2d) 330 (1950)

This section empowers any person interested in the estate of a decedent to make application to have a script purporting to be the will of such decedent "proved," i.e., tested in respect to its validity as a testamentary instrument. It is obvious that the

clause "any . . . person interested in the estate" includes a person who will share in the estate under the law governing intestacy in case a script which purports to be the will of the deceased is adjudged invalid as a testamentary document. *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330 (1950).

§ 31-15. Clerk may compel production of will.

It is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at according to the orderly process of law. *In re Pendergrass' Will*, 251 N. C. 737, 112 S. E. (2d) 562 (1960).

Enforcement of Right to Dispose of

§ 31-17. Proof and examination in writing.

Compliance with this section is essential to a valid probate. *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Testimony of Witnesses Must Be Embodied in Clerk's Certificate.—It is the duty of the clerk taking probate of a will

§ 31-18: Rewritten and renumbered as §§ 31-18.1 to 31-18.3 by Session Laws 1953 c. 1098. s. 12.

§ 31-18.1. Manner of probate of attested written will.—(a) An attested written will executed as provided by G. S. 31-3.3, may be probated in the following manner:

- (1) Upon the testimony of at least two of the attesting witnesses; or
- (2) If the testimony of only one attesting witness is available, then
 - a Upon the testimony of such witness, and
 - b Upon proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and
 - c Upon proof of the handwriting of the testator, unless he signed by his mark, and
 - d Upon proof of such other circumstances as will satisfy the clerk of the superior court as to the genuineness and due execution of the will.
- (3) If the testimony of none of the attesting witnesses is available, then
 - a Upon proof of the handwriting of at least two of the attesting witnesses whose testimony is unavailable, and
 - b Upon compliance with subparagraphs c. and d. of paragraph (2) of this section.
- (b) Due execution of a will may be established, where the evidence required by subsection (a) is unavoidably lacking or inadequate, by testimony of other competent witnesses as to the requisite facts.
- (c) The testimony of a witness is unavailable within the meaning of this section when the witness is dead out of the State, not to be found within the State, insane or otherwise incompetent, physically unable to testify or refuses to testify. (1953. c. 1098 s. 12.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, rewrote former section 31-18 to appear as §§ 31-18.1 to 31-18.3. See note to § 31-1.

For note as to procedure in probating will when witnesses are dead, see 35 N. C. Law Rev. 341.

Stated in *In re Pendergrass' Will*, 251 N. C. 737, 112 S. E. (2d) 562 (1960).

Cited in *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957); *In re Covington's Will*, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

Property.—The legislature, when it granted the right to dispose of property at death, provided for the enforcement of that right under this section. *Matter of Covington's Will*, 252 N. C. 546, 114 S. E. (2d) 257 (1960).

in writing.

to embody the substance of the testimony of witnesses in his certificate of probate to be recorded with the will. *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Compliance with Statutory Requirements.—See *Morris v. Morris*, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

Proof Required When Only One Witness Available.—An attested will may be probated on the testimony of two of the attesting witnesses, but if the testimony

of only one attesting witness is available, then upon the testimony of such witness with proof of the handwriting of at least one of the attesting witnesses who is dead or whose testimony is otherwise unavailable, and proof of the handwriting of the testator, unless he signed by his

§ 31-18.2. Manner of probate of holographic will.—A holographic will may be probated only in the following manner:

(1) Upon the testimony of at least three competent witnesses that they believe that the will is written entirely in the handwriting of the person whose will it purports to be, and that the name of the testator as written in or on, or subscribed to, the will is in the handwriting of the person whose will it purports to be; and

(2) Upon the testimony of one witness who may, but need not be, one of the witnesses referred to in paragraph (1) of this section to a statement of facts showing that the will was found after the testator's death as required by G. S. 31-3.4. (1953, c. 1098 s. 12.)

Cross Reference.—See note to § 31-18.1.
Engraved Monogram Not Signature to Holographic Will.—See note to § 31-3.4.

Applied in *Morris v. Morris*, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

§ 31-18.3. Manner of probate of nuncupative will.—(a) No nuncupative will may be probated later than six months from the time it was made unless it was reduced to writing within ten days after it was made.

(b) Before a nuncupative will may be probated

(1) Written notice must be given to the surviving spouse, if any, and to the next of kin, by the clerk of the court in which it is to be probated, notifying them that the will has been offered for probate and that they may, if they desire, oppose the probate thereof, or

(2) When the surviving spouse or next of kin are not known or when for any other reason such notice cannot be given, a notice to the same effect must be published not less than once a week for four consecutive weeks in some newspaper published in the county where the will is offered for probate, or if no newspaper is published in the county, then in some newspaper having general circulation therein.

(c) A nuncupative will may be probated only in the following manner:

(1) Upon the testimony of at least two competent witnesses who establish the terms of such will and who state that they were simultaneously present at the making thereof, that the testator declared he was then making his will, and that they were then and there specially requested by him to bear witness thereto; and

(2) Upon the testimony of one competent witness, who may but need not be one of the witnesses referred to in paragraph (1) of this subsection, that the will was made in the testator's last illness or while he was in imminent peril of death, and that he did not survive such sickness or imminent peril, but it is not necessary that all such facts be proved by the testimony of the same witness. (1953, c. 1098, s. 12.)

Cross Reference.—See note to § 31-18.1.

§ 31-18.4. Probate of wills of members of the armed forces.—In addition to the methods already provided in existing statutes theretofore, a will executed by a person while in the armed forces of the United States or the Merchant Marine, shall be admitted to probate (whether there were subscribing witnesses thereto or not, if they, or either of them, is out of the State at the time said will is offered for probate) upon the oath of at least three credible witnesses

that the signature to said will is in the handwriting of the person whose will it purports to be. Such will so proven shall be effective to devise real property as well as to bequeath personal estate of all kinds. This section shall not apply to cases pending in courts and at issue on the date of its ratification. (1919, c. 216; C. S., s. 4151; Ex. Sess. 1921, c. 39; 1943, c. 218; 1945, c. 81; 1953, c. 1098, s. 13.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, renumbered former § 31-26 to appear as this section.

§ 31-19. Probate conclusive until vacated; substitution of consolidated bank as executor or trustee under will.

This section is restricted to a decree of probate regular on its face, and does not apply where on the face of the decree of probate it affirmatively shows that the will was not probated as required by mandatory applicable statutes for the probate of wills. *Morris v. Morris*, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

Conclusively Valid until Declared Void.—

Under this section the order of the clerk admitting a paper writing to probate constitutes conclusive evidence that the paper writing is the valid will of the decedent until it is declared void by a competent tri-

bunal on an issue of *devisavit vel non* in a caveat proceeding. *Holt v. Holt*, 232 N. C. 497, 61 S. E. (2d) 448 (1950); *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Cannot Be Attacked Collaterally—Municipality of Title.—

In accord with original. See *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

An order of the clerk, etc.—

In accord with original. See *In re Will of Etheridge*, 231 N.C. 502, 57 S.E.2d 768 (1950).

§ 31-22. Certified copy of will proved in another state or country.

When a resident of this State dies outside the State and his will is probated in another state, a duly certified copy of the will so probated may be offered for original probate in this State, and its validity as a testamentary disposition of property

established in the same manner as if the original had been offered for probate here. *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Applied in *In re Brauff's Will*, 247 N.C. 92, 100 S. E. (2d) 254 (1957).

§ 31-24. Probate when witnesses are nonresident; examination before notary public.—Where one or more of the subscribing witnesses to the will of a testator, resident in this State, reside in another state, or in another county in this State than the one in which the will is being probated, the examination of such witnesses may be had, taken and subscribed in the form of an affidavit, before a notary public residing in the county and state in which the witnesses reside or the clerk of superior court thereof; and the affidavits, so taken and subscribed, shall be transmitted by the notary public or clerk of superior court, under his hand and official seal, to the clerk of the court before whom the will has been filed for probate. If such affidavits are, upon examination by the clerk, found to establish the facts necessary to be established before the clerk to authorize the probate of the will if the witnesses had appeared before him personally, then it shall be the duty of the clerk to order the will to probate, and record the will with the same effect as if the subscribing witnesses had appeared before him in person and been examined under oath. (1917, c. 183; C. S., s. 4149; 1933, c. 114; 1957, c. 587, ss. 1, 1A.)

Editor's Note.—

The 1957 amendment inserted the references to clerk of the superior court.

§ 31-25. Probate when witnesses in another county.—When a will is offered for probate in one county of this State and the witnesses reside in another county, the clerk of the court before whom such will is offered shall have power and authority to issue a subpoena for the witnesses requiring them to ap-

pear before him and prove the will; and the clerk shall likewise have power and authority to issue a commission to take the deposition of such witnesses when they reside outside of the county in which the will is to be probated, such deposition and commission to be returned and the clerk to adjudge the will to be duly proven. Also, when it shall be found as a fact upon affidavit or other proof, by the clerk of any county where a will is to be probated, that any witness to the will resides outside of the county, or inside of the county, and seventy-five miles or less from the place where the will is to be probated, and that the witness is so infirm of body as to be unable to appear in person before the clerk to prove the will, then the clerk shall have the power and authority to issue a commission to take the deposition of the witness, the commission and deposition of the witness to be returned, and the clerk to adjudge the will to be duly proved thereon as if the witness had appeared in person before him. (1899, c. 55; Rev., s. 3132; 1911, c. 13 C. S., s. 4150; 1923, c. 59, 1957, c. 587, s. 2.)

Editor's Note.—

The 1957 amendment substituted in line seven the words "outside of the county in

which" for the words "more than seventy-five miles from the place where."

§ 31-26: Renumbered as § 31-18.4 by Session Laws 1953, c. 1098, s. 13.

§ 31-27. Certified copy of will of nonresident recorded. — Whenever any will made by a citizen or subject of any other state or country is duly proven and allowed in such state or country according to the laws thereof, a copy or exemplification of such will and of the proceedings had in connection with the probate thereof, duly certified, and authenticated by the clerk of the court in which such will has been proved and allowed, if within the United States, or by any ambassador, minister, consul or commercial agent of the United States under his official seal, when produced or exhibited before the clerk of the superior court of any county wherein any property of the testator may be, shall be allowed, filed and recorded in the same manner as if the original and not a copy had been produced, proved and allowed before such clerk. Any such will containing any devise or disposition of real estate in this State shall be valid to pass title to or otherwise dispose of such real estate provided the will is executed according to the laws of this State, notwithstanding the fact that said will was not probated in accordance with the laws of this State, and provided that the execution of said will according to the laws of this State must appear affirmatively from the testimony of a witness or witnesses to such will, or from findings of fact or recitals in the order of probate, or otherwise (to the satisfaction of the clerk of the superior court of the county in which such will is offered for probate), in such certified copy or exemplification of the will and probate proceedings, and if it does not so appear, the clerk before whom the copy is exhibited shall have power to issue a commission for taking proof touching the execution of the will, as prescribed in § 31-23, and the same may be adjudged duly proved, and shall be recorded as herein provided. Any copy of a will of a nonresident heretofore allowed, filed and recorded in this State in compliance with the foregoing shall be valid to pass title to or otherwise dispose of real estate in this State. (C. C. P., s. 444; 1883, c. 144; Code, s. 2156; 1885, c. 393; Rev., s. 3133; C. S., s. 4152; 1941, c. 381; 1965, c. 995.)

Editor's Note.—

The 1965 amendment rewrote the second sentence and added the last sentence.

Probate on Exemplified Copy of Will and Foreign Probate Proceedings—Effect.

—Instead of offering a will of a nonresident dying outside the State and disposing of property in the state for original probate in this State, the interested parties may have it probated in the state in which the testator was domiciled. When pro-

bated according to the laws of that state, an exemplified copy of the will and the probate proceedings may be brought to this State and probated here. Such a will, unless probated in accordance with the laws of this State, is not sufficient to dispose of real property in this State. It has no efficacy for any purpose in this State until probated here, but when probated here on the exemplified copy, it suffices to pass title to personalty and the right to

enforce claims which testator could assert against citizens or properties in this State, even though not executed or proven as required by the laws of this State. In re Marks' Will, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Applied in *In re Brauff's Will*, 247 N. C. 92, 100 S. E. (2d) 254 (1957).

§ 31-31.1. Validation of probates of wills when witnesses examined before notary public; acts of deputy clerks validated.

Cited in *In re Will of Wood*, 240 N. C. 134, 81 S. E. (2d) 127 (1954).

§ 31-31.2. Validation of wills when recorded without order of probate or registration upon oath and examination of subscribing witness or witnesses.—Whenever any last will and testament has been duly presented to the clerk of the superior court, and the said will together with the oath and examination of the subscribing witness or witnesses thereto taken before a notary public in the county in which the will is probated, or taken before a notary public of any other county, or before the clerk of the superior court of said county, or any other county, is duly recorded in the office of the clerk of the superior court of the said county without a formal order of probate or registration, such will, if executed in accordance with the laws of this State, is hereby validated with respect to the probate and registration thereof and shall be sufficient to pass title to all real and personal property purported to be transferred thereby to the same extent that the said will would have done so if there had been a formal order of probate and registration. This section shall apply only to wills presented to the clerk of the superior court and recorded prior to the first day of January, 1943. (1951, c. 725.)

ARTICLE 6.

Caveat to Will.

§ 31-32 When and by whom caveat filed.—At the time of application for probate of any will, and the probate thereof in common form, or at any time within three years thereafter, any person entitled under such will, or interested in the estate, may appear in person or by attorney before the clerk of the superior court and enter a caveat to the probate of such will: Provided, that if any person entitled to file a caveat be within the age of twenty-one years, or insane, or imprisoned, then such person may file a caveat within three years after the removal of such disability.

Notwithstanding the provisions of the first paragraph of this section, as to persons not under disability, a caveat to the probate of a will probated in common form prior to May 1, 1951, must be filed within seven years of the date of probate or within three years from May 1, 1951, whichever period of time is shorter. (C.C.P., s. 446; Code, s. 2158; Rev., s. 3135; 1907, c. 862; C.S., s. 4158; 1925, c. 81; 1951, c. 496, ss. 1, 2.)

Editor's Note.—The 1951 amendment substituted "three" for "seven" in line three, and added the second paragraph. For brief comment on the amendment, see 29 N.C. Law Rev. 427.

Clerk of Superior Court Has Exclusive and Original Jurisdiction.—Upon the clerk of the superior court the statutes of this State confer exclusive and original jurisdiction of proceedings for probate of wills. By this it is meant that the clerk of the superior court has the sole power in the first instance to determine whether a decedent died testate or intestate, and if he died testate, whether the script in dispute

is his will. *Walters v. Baptist Children's Home of North Carolina, Inc.*, 251 N. C. 369, 111 S. E. (2d) 707 (1959).

But when a caveat is filed the superior court acquires jurisdiction of the whole matter in controversy. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Section Strictly Construed.—This section permitting caveats is in derogation of the common law and must be strictly construed. *In re Will of Winborne*, 231 N.C. 463, 57 S. E. (2d) 795 (1950).

The attack upon a will offered for probate must be direct and by caveat. A collateral

attack is not permitted. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

When a paper writing purporting to be a will is presented to the judge of probate, he takes proof with respect to its execution. If found in order the script is admitted to probate in common form as a will. Thus far the proceeding is *ex parte*. It stands as the testator's will, and his only will, until challenged and reversed in a proper proceeding before a competent tribunal. The challenge must be by caveat and be heard in the superior court. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Offering Another Will in Another Proceeding Is Collateral Attack.—Offering another will for probate in another proceeding is a collateral and not a direct attack. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

But Any Material Script May Be Presented in Caveat Proceeding.—In a caveat proceeding any interested person may present to the court any script which is material to the issue whether there is a will, and if so, what is it. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

The probate of a will in common form, being an *ex parte* proceeding on application of the propounder, may be cavedated at the time of application for probate or at any time within seven [now three] years thereafter by "any person entitled under such will, or interested in the estate." *In re Ellis' Will*, 235 N.C. 27, 69 S.E. (2d) 25 (1952).

Thus, Another Purported Will Should Be Offered in Caveat Proceeding.—Any other script purporting to be the decedent's will should be offered and its validity determined in the caveat proceeding. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

A caveat to a will may be filed, etc.—

The right to contest the validity of a writing offered for probate or probated in common form is, by this section, limited to "any person entitled under such will or interested in the estate." *In re Will of Belvin*, 261 N.C. 275, 134 S.E.2d 225 (1964).

Any interested person may challenge the will and contest its validity by filing a caveat setting forth the grounds of the challenge. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

Beneficiaries under Alleged Prior Will Are Interested.—Caveators who allege they are beneficiaries under a prior will of deceased made at a time when he possessed mental capacity are, if the facts be as alleged, interested in the estate. *In re Will*

of *Belvin*, 261 N.C. 275, 134 S.E.2d 225 (1964).

A proceeding to contest a will is begun by filing a caveat or objection to probate with the clerk of the superior court, who thereupon transfers the proceeding to the civil issue docket of the superior court to the end that the issue of *devisavit vel non* may be tried in term by a jury. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. (2d) 330 (1950), commented on in 29 N.C. Law Rev. 331.

The probate powers of the judiciary afford a complete remedy to a person interested against an alleged will in instances where those interested for the alleged will do not propound it for probate. He may invoke such remedy by the simple expedient of simultaneously applying to the clerk of the superior court having jurisdiction to have the script probated or proved, i.e., tested, and filing a caveat asking that it be declared invalid as a testamentary instrument. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. (2d) 330 (1950), commented on in 29 N.C. Law Rev. 331.

The Contest Is a Special Proceeding in Rem.—

In accord with 2nd paragraph in original. See *In re Will of Cox*, 254 N.C. 90, 118 S.E. (2d) 17 (1961).

Upon the filing of the caveat, the proceeding is transferred to the civil issue docket for trial before a jury. Upon this transfer, notice is given to all interested persons of the challenge, giving them an opportunity to enter and participate in the proceedings to the end that the court may determine whether the decedent left a will and, if so, whether any of the scripts before the court is the will. The proceeding is in rem, in which the court pronounces its judgment as to whether the res, i.e., the script itself, is the will of the deceased. *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965).

This section permits a person in interest to file a caveat to an alleged will offered for probate, and to contest the validity of such alleged will before it has been admitted to probate. *Brissie v. Craig*, 232 N.C. 701, 62 S.E. (2d) 330 (1950), commented on in 29 N.C. Law Rev. 331; *Walters v. Baptist Children's Home of North Carolina, Inc.*, 251 N.C. 369, 111 S.E. (2d) 707 (1959).

Limitation of Actions.—

A will is not subject to caveat or collateral attack 27 years after it has been probated in common form; but if the will is void for vagueness and uncertainty it is a nullity and may be attacked directly or collaterally or treated as ineffective, anywhere

at any time. *Burchett v. Mason*, 233 N. C. 306, 63 S. E. (2d) 634 (1951).

Same—Condition Not Subject to Waiver. —The requirement that caveat proceedings be instituted within seven [now three] years from the probate of the will in com-

mon form is a condition attached to the right to file caveat and may not be waived by the parties. *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

Cited in *In re Bartlett's Will*, 235 N. C. 489, 70 S. E. (2d) 482 (1952).

§ 31-33. Bond given and cause transferred to trial docket.

For Trial by Jury.—

In accord with original. See *In re Bartlett's Will*, 235 N. C. 489, 70 S. E. (2d) 482 (1952).

When a caveat is filed and bond given, the clerk does not take testimony, he submits no issue to the jury, but immediately transfers the cause to the superior court in term, which submits to a jury issues necessary to determine the validity of the instrument asserted to be the will of deceased. *In re Will of Belvin*, 261 N.C. 275, 134 S.E.2d 225 (1964).

Compliance with this section in respect to bond for costs is prerequisite to the institution of a caveat proceeding, and the mere filing of the caveat without compliance with the statute constitutes no valid attack upon the will and is insufficient to authorize the clerk to issue the required

citations to bring interested parties into court. *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

Where caveat is filed without compliance with this section relating to bond, there is no valid caveat, and after the expiration of seven [now three] years the right to file caveat ceases to exist and may not be revived by the giving of a cash bond under an extension of time granted by the court after the expiration of the statutory period. *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

A check deposited with the clerk to be held in lieu of bond is insufficient to meet the requirements of this section. *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

Cited in *Muncie v. Travelers Ins. Co.*, 253 N. C. 74, 116 S. E. (2d) 474 (1960).

§ 31-36. Caveat suspends proceedings under will.

Preservation of Estate Pending Final Determination of Issue. —Under the provisions of this section, the executor is charged with the preservation of the estate pending final determination of the issue raised by the caveat, unless and until he be removed, and it is error for the court to appoint commissioners to handle the estate. *In re Tatum's Will*, 233 N. C. 723, 65 S. E. (2d) 351 (1951).

Suspension does not prevent the administrator from suing and being sued. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Thus, administrator has authority to defend an action against the estate for collection of an alleged debt. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Cited in *Matter of Covington's Will*, 252 N. C. 546, 114 S. E. (2d) 257 (1960).

ARTICLE 7.

Construction of Will.

§ 31-38. Devise presumed to be in fee.

Section Changes Common-Law Rule.—

The purpose of this section was to change the common-law rule that a devise of lands without words of perpetuity conveyed a life estate only unless there was a manifest intention to convey the fee. *Morris v. Morris*, 246 N. C. 314, 98 S. E. (2d) 298 (1957); *Clark v. Connor*, 253 N. C. 515, 117 S. E. (2d) 465 (1960).

It Applies to Real and Personal Property. —The provisions of this section apply to the disposition by will of both personal and real property. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

Gift of Personality with Full Power to Use Is Absolute. —Where there is no re-

siduary clause in the will and no limitation over so far as the personal property is concerned, a gift of personal property for life to the primary object of testator's bounty, with power to use "in any way that she may desire" is generally construed to be an absolute gift of the property. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

Unless Will Negatives Statutory Presumption of Unconditional Gift. — Where testator, after devising his wife a life estate in his realty with remainder over to his children, bequeathed his wife "all or so much of my personal property . . . as she may desire to have and to use or dispose

of during her lifetime," and directed that all personal property not so sold or disposed of should be divided among his children, the residuary legatees, it was held that the expressed intent of the testator negatived the statutory presumption that he gave his personal estate unconditionally to his wife. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

Unrestricted Devise Passes Fee.—

A devise will carry the fee unless it appears from the will that the testator intended to convey an estate of less dignity. *Clark v. Connor*, 253 N.C. 515, 117 S.E. (2d) 465 (1960).

Unless a will contains plain and express language, showing that the testator did not intend to devise a fee, the devise will be construed as one in fee simple. *Basnight v. Dill*, 256 N.C. 474, 124 S.E. (2d) 159 (1962).

Words of Perpetuity Not Required to Create Fee.—Since this section no words of perpetuity are required and a devise without them will carry the fee unless it appears from the will the testator intended to convey an estate less than the fee. *Morris v. Morris*, 246 N.C. 314, 98 S.E. (2d) 298 (1957).

The clause "I give, devise and bequeath," etc.—

The words "give, devise and bequeath," used by a testatrix in devising her property to a husband and wife as tenants by the entireties, in light of the provisions of this section, gave them a fee simple title to the devised property. *Basnight v. Dill*, 256 N.C. 474, 124 S.E. (2d) 159 (1962).

Devise with Power of Disposition neither Expressed nor Implied.—Where the gift to the first taker is in language sufficient, standing alone, to pass a fee simple estate, but no absolute power of disposition is expressed or necessarily implied, the gift is a life estate, provided from other clauses of the will it appears that, at the death of the first taker, testator intends and directs a limitation over to another or others. *Andrews v. Andrews*, 253 N.C. 139, 116 S.E. (2d) 436 (1960).

Devise for Life with Remainder to Heirs.—When a devise is to a named person for life with remainder after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," nothing else appearing, the devisee becomes seized of a fee simple estate upon the death of the testator subject to any prior life estate created by the will. *Hammer v. Brantley*, 244 N.C. 71, 92 S.E. (2d) 424 (1956).

Devise Vesting Fee in Children.—A de-

vise of land with provision that the rents should be used by testator's wife and children until they should become of age, and that the lands should be divided among them all upon the children coming of age or upon the prior death of the widow, with further provision that they should have no right to sell the lands except to each other, was held upon the death of the widow, to vest in fee simple in the children. *Langston v. Wooten*, 232 N.C. 124, 59 S.E. (2d) 605 (1950).

Estate Tail Converted, etc.—

Where testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on," the brother took a life estate with remainder to his children and the named grandson in fee under the Rule in Shelley's Case, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession and created an estate tail converted into a fee by § 41-1. *In re Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

Language Insufficient to Show Intent to Pass Less than Fee Simple Estate.—See *Mangum v. Wilson*, 235 N.C. 353, 70 S.E. (2d) 19 (1952).

A devise of all testator's property, employing the words "give, devise, and bequeath" and expressing testator's desire that the estates devised and bequeathed be held intact as nearly as practicable, by marriage contract if the devisees married, and at the death of the devisees be divided among nephews and nieces, vested an absolute fee simple title in the named devisees. *Humphrey v. Faison*, 247 N.C. 127, 100 S.E. (2d) 524 (1957).

Language Showing Intention to Give Estate in Residuary Devise of Less Dignity than Fee Simple.—See *Woodard v. Clark*, 234 N.C. 215, 66 S.E. (2d) 888 (1951).

Where an estate is reduced from a life estate to a dower interest, in the event of remarriage, it is a manifest indication of the testator's purpose to devise his wife an estate of less dignity than a fee simple. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

Subsequent Expressions, etc.—

Where real estate is devised in fee, or personality bequeathed unconditionally, a subsequent clause in the will expressing a wish, desire, or direction for its disposition after the death of the devisee or legatee will not defeat the devise or bequest, nor limit

it to a life estate. *Worsley v. Worsley*, 260 N.C. 259, 132 S.E.2d 579 (1963).

An unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee, and a subsequent clause in the will purporting to dispose of what remains at his death is not allowed to defeat the devise nor limit it to a life estate. *Quickel v. Quickel*, 261 N.C. 696, 136 S.E.2d 52 (1964).

Rules of Construction — Intention of Testator.—The rule is elementary that the intention of the testator is the polar star which is to guide in the interpretation of all wills, and, when ascertained, effect will be given to it unless it violates some rule of law, or is contrary to public policy. In ascertaining this intention the language used, and the sense in which it is used by the testator is the primary source of information, as it is the expressed intention of the testator which is sought. *Clark v. Connor*, 253 N.C. 515, 117 S.E. (2d) 465 (1960).

The intent of the testatrix is her will and must be carried out unless some rule of law forbids it. *In re Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

The basic rule of construction, and the refrain of every opinion which seeks to comprehend a testamentary plan, is that the intent of the testator is the polar star that must guide the courts in the interpretation of a will. *In re Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

The rule, that an unrestricted or general devise of real property, to which is affixed, either specifically or by implication, an unlimited power of disposition in the first taker, conveys the fee and a subsequent clause in the will purporting to dispose of what remains at his death is not allowed to defeat the devise nor limit it to a life estate, as well as all rules of construction, must yield to the paramount intent of the testator as gathered from the four corners of the will. *Quickel v. Quickel*, 261 N.C. 696, 136 S.E.2d 52 (1964).

§ 31-39. Probate necessary to where land lies; rights of innocent purchasers.—No will shall be effectual to pass real or personal estate unless it be recorded in the office of the superior court clerk of the county wherein the land is situate, and the probate of a will devising real estate shall be conclusive as to the execution thereof against the heirs and devisees of the testator whenever the probate thereof under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator or when such purchase is made after the filing of the final account by the duly authorized administrator of the decedent and the

Same — Ordinary Words.—Generally, ordinary words are to be given their usual and ordinary meaning, and technical words are presumed to have been used in a technical sense. *Clark v. Connor*, 253 N.C. 515, 117 S.E. (2d) 465 (1960).

Same—Words with Well-Defined Legal Significance.—If words or phrases are used which have a well-defined legal significance, established by a line of judicial decisions, they will be presumed to have been used in that sense, in the absence of evidence of a contrary intent. *Clark v. Connor*, 253 N.C. 515, 117 S.E. (2d) 465 (1960).

Same—Isolated Clauses or Sentences.—Isolated clauses or sentences are not to be considered by themselves, but the will is to be considered as a whole, and its different clauses and provisions examined and compared, so as to ascertain the general plan and purpose of the testator, if there be one. *Clark v. Connor*, 253 N.C. 515, 117 S.E. (2d) 465 (1960).

Same—Prior Decisions.—Little or no aid can be derived by a court in construing a will from prior decisions in other will cases. It is not sufficient that the same words in substance or even literally have been construed in other cases. It often happens that the same identical words require very different constructions according to context and the peculiar circumstances of each case. *Clark v. Connor*, 253 N.C. 515, 117 S.E. (2d) 465 (1960).

Applied in *Blackwood v. Blackwood*, 237 N.C. 726, 76 S.E. (2d) 122 (1953); *Walters v. Baptist Children's Home of North Carolina, Inc.*, 251 N.C. 369, 111 S.E. (2d) 707 (1959); *Poindexter v. Wachovia Bank & Trust Co.*, 258 N.C. 371, 128 S.E. (2d) 867 (1963).

Quoted in *Elmore v. Austin*, 232 N.C. 13, 59 S.E. (2d) 205 (1950).

Cited in *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

pass title; recordation in county purchasers.—No will shall be effectual to pass title; recordation in county shall have been duly proved and allowed and a duly certified copy thereof shall be conclusive as to the execution thereof against the heirs and devisees of the testator whenever the probate thereof under the like circumstances, would be conclusive against the next of kin and legatees of the testator: Provided, that the probate and registration of any will shall not affect the rights of innocent purchasers for value from the heirs at law of the testator when such purchase is made more than two years after the death of such testator or when such purchase is made after the filing of the final account by the duly authorized administrator of the decedent and the

approval thereof by the clerk of the superior court having jurisdiction of the estate. Such conveyances, if made before the expiration of the time required by this section to have elapsed in order for same to be valid as against the heirs and devisees of the testator, shall, upon the expiration of such time, become good and valid to the same effect as if made after the expiration of such time, unless in the meantime a proceeding shall have been instituted in the proper court to probate the will of the testator. (1784, c. 225, s. 6; R. C., c. 119, s. 20; Code, s. 2174; Rev., s. 3139; 1915, c. 219; C. S., s. 4163; 1953, c. 920, s. 1.)

Editor's Note.—The 1953 amendment struck out the words "unless the will has been fraudulently withheld from probate" and inserted in lieu thereof all of the section following the word "testator" in line eleven. Section 4 of the amendatory act provided that it should not apply to the estate of any decedent dying prior to April 23, 1953.

Probate an Indispensable Prerequisite.—

An unprobated will is not muniment of title; it cannot be established as a will in a collateral proceeding; it conveys no title to property until it is probated and recorded. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Where the probate shows on its face

that the paper writing has never been validly proven and probated as a holographic will, it is ineffective to pass real or personal property. *Morris v. Morris*, 245 N. C. 30, 95 S. E. (2d) 110 (1956).

Will Ineffectual as Transfer of Title or Cloud Thereon during Lifetime of Testator.—A paper writing making testamentary disposition of property is without legal significance either as a transfer of title or as a cloud thereon during the lifetime of the person executing it, since a will takes effect only upon the death of the testator and the probate of the instrument. *Vandiford v. Vandiford*, 241 N. C. 42, 84 S. E. (2d) 278 (1954).

§ 31-40. What property passes by will.

Items of will disposing of real estate not owned by testator were held valid to the extent that they disposed of real and personal property owned by the testator. *Taylor v. Taylor*, 243 N. C. 726, 92 S. E. (2d) 136 (1956).

Cited in *Wachovia Bank & Trust Co. v. Waddell*, 234 N. C. 454, 67 S. E. (2d) 651 (1951); *Honeycutt v. Citizens Nat. Bank*, 242 N. C. 734, 89 S. E. (2d) 598 (1955).

§ 31-41. Will relates to death of testator.

The general rule, etc.—

A will takes effect and speaks as of the date of the testator's death. *Wachovia Bank & Trust Co. v. McKee*, 260 N.C. 416, 132 S.E.2d 762 (1963).

Section Relates to Subject Matter, etc.—In accord with original. See *Thomas v. Thomas*, 258 N. C. 590, 129 S. E. (2d) 239 (1963).

Will Relates Back to Death When Probated and Recorded.—Once a will is admitted to probate and recorded by the clerk, it relates back to the death of the testator. *Hargrave v. Gardner*, 264 N.C. 117, 141 S.E.2d 36 (1965).

Date on Will Immaterial.—When a writing purporting to be a will has been duly probated and thereby determined to be the last will of the deceased, it is effective as of the moment of testator's death, and the date appearing on the instrument then becomes immaterial. *In re Marks' Will*, 259 N. C. 326, 130 S. E. (2d) 673 (1963).

Exception to General Rule.—

While the dispositive provisions of a will speak as of the death of the testator, in ascertaining testator's intent the will must be considered in the light of the conditions and circumstances existing at the time it was made. *Wachovia Bank & Trust Co. v. Green*, 239 N. C. 612, 80 S. E. (2d) 771 (1954).

Applied in *Gatling v. Gatling*, 239 N. C. 215, 79 S. E. (2d) 466 (1954); *Wachovia Bank & Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E.2d 182 (1965).

Stated in *Vandiford v. Vandiford*, 241 N. C. 42, 84 S. E. (2d) 278 (1954).

§ 31-42. Failure of devises and legacies by lapse or otherwise.—(a)
Devolution of Devise or Legacy to Person Predeceasing Testator.—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken individually had he survived the testator, and he dies survived by issue before the testator, whether

he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will.

(b) Devolution of Devise or Legacy to Member of Class Predeceasing Testator.—Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a devisee or legatee who would have taken as a member of a class had he survived the testator, and he dies survived by issue before the testator, whether he dies before or after the making of the will, such devise or legacy shall pass by substitution to such issue of the devisee or legatee as survive the testator in all cases where such issue of the deceased devisee or legatee would have been an heir of the testator under the provisions of the Intestate Succession Act had there been no will: Provided, however, if such devisee or legatee is not survived by such issue, then the entire property interest therein shall devolve upon the remaining members of the class who survive the testator.

(c) Devolution of Void, Revoked, Renounced or Lapsed DeVises or Legacies.—If subsections (a) and (b) above are not applicable and if a contrary intent is not indicated by the will:

- (1) Where a devise or legacy of any interest in property is void, is revoked, is renounced, or lapses or which for any other reason fails to take effect, such a devise or legacy shall pass
 - a. Under the residuary clause of the will applicable to real property in case of such devise, or applicable to personal property in case of such legacy, or
 - b. As if the testator had died intestate with respect thereto when there is no such applicable residuary clause; and
- (2) Where a residuary devise or legacy is void, revoked, renounced, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto. (1844, c. 88, s. 4; R. C., c. 119, s. 7; Code, s. 2142; Rev., s. 3142; 1919, c. 28; C. S., s. 4166; 1951, c. 762, s. 1; 1953, c. 1084; 1965, c. 938, s. 1.)

Editor's Note. — The 1951 amendment rewrote former § 31-42 to appear as this section and former §§ 31-42.1 and 31-42.2. For brief comment on amendment, see 29 N. C. Law Rev. 425.

The 1953 amendment inserted the words "is issue of the testator or."

The 1965 amendment, effective July 1, 1965, again rewrote this section, incorporating therein provisions similar to former §§ 31-42.1 and 31-42.2. Section 3 of the amendatory act provides: "This act shall apply to wills of persons who die on or after the effective date hereof."

Some of the cases in the following note were decided under former §§ 31-42.1 and 31-42.2.

For article on lapse, abatement and ademption, see 39 N. C. Law Rev. 313. For note concerning adopted children as issue, see 40 N.C.L. Rev. 650 (1962).

Limitation Over Held to Lapse.—Where testatrix left property in trust to her son

for life with remainder over to his issue, and in the event the son should leave no issue, to testatrix's brothers and sisters, and all except one of testatrix's brothers and sisters predeceased her, and the sister who survived her died during the lifetime of the son, the limitation over to the brothers and sisters of testatrix lapsed, since the children of the brothers and sisters of testatrix who predecease testatrix do not qualify under this section, and no transmittible estate vested in the sister of testatrix who died during the lifetime of testatrix's son. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N. C. 371, 128 S. E. (2d) 867 (1963).

Standing of Adopted Child. — Where a parent by adoption is named a legatee in the will of her mother, but dies prior to the death of her mother, the adopted child takes the personality bequeathed his mother by adoption under this section, even though

the adoption was subsequent to the execution of the will, since under the provisions of § 48-23 the adopted child has the same standing as though he had been born to his adoptive parent at the time of the adoption. *Headen v. Jackson*, 255 N. C. 157, 120 S. E. (2d) 598 (1961).

Residuary Clause Comprises All Property Not Otherwise Provided for.—It was intended by this section that the property passing by residuary clause of a will should comprise all the estate owned by the testator at time of his death not otherwise specifically devised or provided for, and should include any described in a devise which may have lapsed, or become void or incapable of taking effect. *Renn v. Williams*, 233 N. C. 490, 64 S. E. (2d) 437 (1951).

Subject Matter of Void Legacy Included in Residuary Legacy.—A legacy which is void under the terms of § 31-10, which makes those legacies whose beneficiaries were attesting witnesses to the will void, passes under the residuary clause of the will. *Renn v. Williams*, 233 N. C. 490, 64 S. E. (2d) 437 (1951).

§§ 31-42.1, 31-42.2: Repealed by Session Laws 1965, c. 938, s. 2, effective July 1, 1965.

Cross Reference. — For similar provisions, see § 31-42.

§ 31-43 General gift by will and execution of power of appointment.

Editor's Note. — For article on estate planning and powers of appointment, see 30 N.C. Law Rev. 225.

§ 31-44: Repealed by Session Laws 1951, c. 762, s. 2.

§ 31-45: Rewritten and renumbered as § 31-5.5 by Session Laws 1953, c. 1098, s. 7.

§ 31-46 Validity of will; which laws govern.—A will is valid if it meets the requirements of the applicable provisions of law in effect in this State either at the time of its execution or at the time of the death of the testator. (1953, c. 1098, s. 14.)

ARTICLE 8.

Devise or Bequest to Trustee of an Existing Trust.

§ 31-47. Devise or bequest to trustee of an existing trust.—A devise or bequest in a will duly executed pursuant to the provisions of this chapter may be made in form or substance to the trustee of a trust established in writing prior to the execution of such will. Such devise or bequest shall not be invalid because the trust is amendable or revocable or both by the settlor or any other person or persons; nor because the trust instrument or any amendment thereto was not executed in the manner required for wills, nor because the trust was amended after execution of the will. Unless the will provides otherwise, such devise or bequest shall operate to dispose of property under the terms of the trust as they appear in writing at the testator's death and the property shall not be deemed held under a testamentary trust. An entire revocation of the trust prior

Devise Passing under Residuary Clause.—It is settled law in this jurisdiction, by reason of the provisions of this section, that where a contrary intent does not appear in a will, ordinarily a lapsed, void or rejected devise will pass under an effective residuary clause. *Featherstone v. Pass*, 232 N. C. 349, 60 S. E. (2d) 236 (1950).

Devise Not Passing under Residuary Clause.—Testator devised certain property to his sister for life, remainder to the county to be used as a charitable hospital, with further provision that if the property should not be so used the county should forfeit the right of possession and title, and the property pass to testator's heirs at law. It was held that upon the renunciation by the county after the death of the life tenant, the remainder passes to testator's heirs in accordance with the expressed intent of testator, leaving no interest to pass under the subsequent residuary clause of the will. *Featherstone v. Pass*, 232 N. C. 349, 60 S. E. (2d) 236 (1950).

to the testator's death shall invalidate the devise or bequest. (1955, c. 388; 1957, c. 783, s. 1.)

Editor's Note.—The 1957 amendment substituted "to" for "of" in the catchline.

Chapter 31A.

Acts Barring Property Rights.

Article 1.

Rights of Spouse.

Sec.

31A-1. Acts barring rights of spouse.

Article 2.

Parents.

31A-2. Acts barring rights of parents.

Article 3.

Wilful and Unlawful Killing of Decedent.

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not applicable

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ARTICLE 1.

Rights of Spouse.

§ 31A-1. Acts barring rights of spouse.—(a) The following persons shall lose the rights specified in subsection (b) of this section:

- (1) A spouse from whom or by whom an absolute divorce or marriage annulment has been obtained or from whom a divorce from bed and board has been obtained, or
- (2) A spouse who voluntarily separates from the other spouse and lives in adultery and such has not been condoned; or
- (3) A spouse who wilfully and without just cause abandons and refuses to live with the other spouse and is not living with the other spouse at the time of such spouse's death; or
- (4) A spouse who obtains a divorce the validity of which is not recognized under the laws of this State; or
- (5) A spouse who knowingly contracts a bigamous marriage.

(b) The rights lost as specified in subsection (a) of this section shall be as follows:

- (1) All rights of intestate succession in the estate of the other spouse;
- (2) All right to claim or succeed to a homestead in the real property of the other spouse;
- (3) All right to dissent from the will of the other spouse and take either the intestate share provided or the life interest in lieu thereof;
- (4) All right to any year's allowance in the personal property of the other spouse;
- (5) All right to administer the estate of the other spouse; and
- (6) Any rights or interests in the property of the other spouse which by a settlement before or after marriage were settled upon the offending spouse solely in consideration of the marriage.

(c) Any act specified in subsection (a) of this section may be pleaded in bar of any action or proceeding for the recovery of such rights, interests or estate as set forth in subsection (b) of this section.

(d) The spouse not at fault may sell and convey his or her real and personal property without the joinder of the other spouse, and thereby bar the other spouse of all right, title and interest therein in the following instances:

- (1) During the continuance of a separation arising from a divorce from bed and board as specified in subsection (a) (1) of this section, or
- (2) During the continuance of a separation arising from adultery as specified in subsection (a) (2) of this section, or during the continuance of a separation arising from an abandonment as specified in subsection (a) (3) of this section, or
- (3) When a divorce is granted as specified in subsection (a) (4) of this section, or a bigamous marriage contracted as specified in subsection (a) (5) of this section. (1961, c. 210, s. 1; 1965, c. 850.)

Editor's Note. — The act adding this chapter was effective as of Oct. 1, 1961.

The 1965 amendment substituted "without the joinder of the other spouse" for "as if such person were unmarried" near the beginning of subsection (d).

For article discussing this chapter, section by section, see 40 N. C. Law Rev. 175.

Cited in *In re Estate of Perry*, 256 N. C. 65, 123 S. E. (2d) 99 (1961); *Durham Bank & Trust Co. v. Pollard*, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

ARTICLE 2.

Parents.

§ 31A-2. Acts barring rights of parents.—Any parent who has wilfully abandoned the care and maintenance of his or her child shall lose all right to intestate succession in any part of the child's estate and all right to administer the estate of the child, except—

- (1) Where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death; or
- (2) Where a parent has been deprived of the custody of his or her child under an order of a court of competent jurisdiction and the parent has substantially complied with all orders of the court requiring contribution to the support of the child. (1961, c. 210, s. 1.)

Applied in *In re Peacock*, 261 N.C. 749, 136 S.E.2d 91 (1964).

ARTICLE 3.

Wilful and Unlawful Killing of Decedent.

§ 31A-3. Definitions.—As used in this article, unless the context otherwise requires, the term—

- (1) "Slayer" means
 - a. Any person who by a court of competent jurisdiction shall have been convicted as a principal or accessory before the fact of the wilful and unlawful killing of another person; or
 - b. Any person who shall have entered a plea of guilty in open court as a principal or accessory before the fact of the wilful and unlawful killing of another person; or
 - c. Any person who, upon indictment or information as a principal or accessory before the fact of the wilful and unlawful killing of another person, shall have tendered a plea of nolo contendere which was accepted by the court and judgment entered thereon; or
 - d. Any person who shall have been found in a civil action or pro-

ceeding brought within one year after the death of the decedent to have wilfully and unlawfully killed the decedent or procured his killing, and who shall have died or committed suicide before having been tried for the offense and before the settlement of the estate.

- (2) "Decedent" means the person whose life is taken by the slayer as defined in subdivision (1).
- (3) "Property" means any real or personal property and any right or interest therein. (1961, c. 210, s. 1.)

Acquittal of Murder Avoids Forfeiture.—A plea by widow that she has been acquitted of the murder of her husband

she has forfeited her property rights as his widow. *McMichael v. Proctor*, 243 N. C. 479, 91 S. E. (2d) 231 (1956), decided under former § 28-10.

§ 31A-4. Slayer barred from testate or intestate succession and other rights.—The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:

- (1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.
- (2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession, such property shall pass to others next in succession in accordance with the applicable provision of the Intestate Succession Act.
- (3) Where the decedent dies testate as to property which would have passed to the slayer pursuant to the will, such property shall pass as if the decedent had died intestate with respect thereto, unless otherwise disposed of by the will. (1961, c. 210, s. 1.)

§ 31A-5. Entirety property.—Where the slayer and decedent hold property as tenants by the entirety:

- (1) If the wife is the slayer, one-half of the property shall pass upon the death of the husband to his estate, and the other one-half shall be held by the wife during her life, subject to pass upon her death to the estate of the husband; and
- (2) If the husband is the slayer, he shall hold all of the property during his life subject to pass upon his death to the estate of the wife. (1961, c. 210, s. 1.)

§ 31A-6. Survivorship property.—(a) Where the slayer and the decedent hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the decedent's share thereof shall pass immediately upon the death of the decedent to his estate, and the slayer's share shall be held by the slayer during his lifetime and at his death shall pass to the estate of the decedent. During his lifetime, the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer.

(b) Where three or more persons, including the slayer and the decedent, hold property with right of survivorship as joint tenants, joint owners, joint obligees or otherwise, the portion of the decedent's share which would have accrued to the slayer as a result of the death of the decedent shall pass to the estate of the decedent. If the slayer becomes the final survivor, one-half of the property then held by the slayer shall pass immediately to the estate of the decedent, and upon the death of the slayer the remaining interest of the slayer shall pass to the estate of the decedent. During his lifetime the slayer shall have the right to the income from his share of the property subject to the rights of creditors of the slayer. (1961, c. 210, s. 1.)

§ 31A-7. Reversions and vested remainders.—(a) Where the slayer holds a reversion or vested remainder in property subject to a life estate in the

decedent and the slayer would have obtained the right of present possession upon the death of the decedent, such property shall pass to the estate of the decedent during the period of the life expectancy of the decedent.

(b) Where the slayer holds a reversion or vested remainder in property subject to a life estate in a third person which is measured by the life of the decedent, such property shall remain in the possession of the third person during the period of the life expectancy of the decedent. (1961, c. 210, s. 1.)

§ 31A-8. Contingent remainders and executory interests.—As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:

- (1) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent; but
- (2) In any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent. (1961, c. 210, s. 1.)

§ 31A-9. Divesting of interests in property.—Where the slayer holds any interest in property, whether vested or not, subject to be divested, diminished in any way or extinguished if the decedent survives him or lives to a certain age, such interest shall be held by the slayer during his lifetime or until the decedent would have reached such age but shall then pass as if the decedent had died immediately after the death of the slayer or the reaching of such age. (1961, c. 210, s. 1.)

§ 31A-10. Powers of appointment and revocation.—(a) As to any exercise in the will of the decedent of a power of appointment in favor of the slayer, the slayer shall be deemed to have predeceased the decedent and the slayer shall not acquire any property or receive any benefit by virtue of such appointment and the appointed property shall pass in accordance with the applicable lapse statute if any.

(b) Property held either presently or in remainder by the slayer subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment shall pass to the estate of the decedent; and property so held by the slayer subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons shall pass to such person or persons or in equal shares to the members of such class of persons, exclusive of the slayer. (1961, c. 210, s. 1.)

§ 31A-11. Insurance benefits.—(a) Insurance and annuity proceeds payable to the slayer:

- (1) As the beneficiary or assignee of any policy or certificate of insurance on the life of the decedent, or
- (2) In any other manner payable to the slayer by virtue of his surviving the decedent, shall be paid to the person or persons who would have been entitled thereto as if the slayer had predeceased the decedent.

(b) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the estate of the decedent upon the death of the slayer, unless the policy names some person other than the slayer or his estate as alternative beneficiary.

(c) Any insurance or annuity company making payment according to the terms of its policy or contract shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without notice of circumstances tending to bring it within the provisions of this chapter. (1961, c. 210, s. 1.)

§ 31A-12. Persons acquiring from slayer protected.—The provisions of this chapter shall not affect the rights of any person who, before the interests of the slayer have been adjudicated, acquires from the slayer for adequate consideration property or an interest therein which the slayer would have received except for the terms of this chapter, provided the same is acquired without notice of circumstances tending to bring it within the provisions of this chapter; but all consideration received by the slayer shall be held by him in trust for the persons entitled to the property under the provisions of this chapter, and the slayer shall also be liable both for any portion of such consideration which he may have dissipated, and for any difference between the actual value of the property and the amount of such consideration. (1961, c. 210, s. 1.)

ARTICLE 4.

General Provisions.

§ 31A-13. Record determining slayer admissible in evidence.—The record of the judicial proceeding in which the slayer was determined to be such, pursuant to § 31A-3 of this chapter, shall be admissible in evidence for or against a claimant of property in any civil action arising under this chapter. (1961, c. 210, s. 1.)

Cited in *Durham Bank & Trust Co. v. Pollard*, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

§ 31A-14. Uniform Simultaneous Death Act not applicable.—The Uniform Simultaneous Death Act, G. S. 28-161.1 through 28-161.7, shall not apply to cases governed by this chapter. (1961, c. 210, s. 1.)

§ 31A-15. Chapter to be broadly construed.—This chapter shall not be considered penal in nature, but shall be construed broadly in order to effect the policy of this State that no person shall be allowed to profit by his own wrong. As to all acts specifically provided for in this chapter, the rules, remedies, and procedures herein specified shall be exclusive, and as to all acts not specifically provided for in this chapter, all rules, remedies and procedures, if any, which now exist or hereafter may exist either by virtue of statute, or by virtue of the inherent powers of any court of competent jurisdiction, or otherwise, shall be applicable. (1961, c. 210, s. 1.)

Quoted in *Durham Bank & Trust Co. v. Pollard*, 256 N. C. 77, 123 S. E. (2d) 104 (1961).

Chapter 32.

Fiduciaries.

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ARTICLE 1.*Uniform Fiduciaries Act.*

§ 32-1. Short title.—This article may be cited as the Uniform Fiduciaries Act. (1923, c. 85, s. 14; C. S., s. 1864(d); 1965, c. 628, s. 2.)

Cross References.—For provisions as to investment securities under the Uniform Commercial Code, see §§ 25-8-101 to 25-8-406. As to removal of fiduciaries who cannot be found, see § 28-118.1.

Editor's Note.—This article contains §§ 32-1 through 32-13.

The 1965 amendment substituted "article" for "chapter."

§ 32-2. Definition of terms.—(a) In this article unless the context or subject matter otherwise requires:

"Bank" includes any person or association of persons, whether incorporated or not, carrying on the business of banking.

"Fiduciary" includes a trustee under any trust, expressed, implied, resulting or constructive, executor, administrator, guardian, conservator, curator, receiver, trustee in bankruptcy, assignee for the benefit of creditors, partner, agent, officer of a corporation, public or private, public officer, or any other person acting in a fiduciary capacity for any person, trust or estate.

"Person" includes a corporation, partnership, or other association, or two or more persons having a joint or common interest.

"Principal" includes any person to whom a fiduciary as such owes an obligation.

(b) A thing is done "in good faith" within the meaning of this article when it is in fact done honestly, whether it be done negligently or not. (1923, c. 85, s. 1; C. S., s. 1864(e); 1965, c. 628, s. 2.)

Editor's Note. — The 1965 amendment substituted "article" for "chapter."

Cited in Allen v. Currie, 254 N. C. 636, 119 S. E. (2d) 917 (1961).

§ 32-12. Cases not provided for in article.—In any case not provided for in this article the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply. (1923, c. 85, s. 12; C. S., s. 1864(p); 1965, c. 628, s. 2.)

Editor's Note. — The 1965 amendment substituted "article" for "chapter."

§ 32-13. Uniformity of interpretation.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1923, c. 85, s. 13; C. S., s. 1864(q); 1965, c. 628, s. 2.)

Editor's Note.—The 1965 amendment substituted "article" for "chapter."

ARTICLE 2.*Security Transfers.*

§ 32-14. Definitions. — In this article, unless the context otherwise requires:

(1) "Assignment" includes any written stock power, bond power, bill of sale, deed, declaration of trust or other instrument of transfer.

- (2) "Claim of beneficial interest" includes a claim of any interest by a decedent's legatee, distributee, heir or creditor, a beneficiary under a trust, a ward, a beneficial owner of a security registered in the name of a nominee, or a minor owner of a security registered in the name of a custodian, or a claim of any similar interest, whether the claim is asserted by the claimant or by a fiduciary or by any other authorized person on his behalf, and includes a claim that the transfer would be in breach of fiduciary duties.
- (3) "Corporation" means a private or public corporation, association or trust issuing a security.
- (4) "Fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian or nominee.
- (5) "Person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal or commercial entity.
- (6) "Security" includes any share of stock, bond, debenture, note or other security issued by a corporation which is registered as to ownership on the books of the corporation.
- (7) "Transfer" means a change on the books of a corporation in the registered ownership of a security.
- (8) "Transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation. (1959, c. 1246, s. 1.)

Cross Reference.—For provisions as to investment securities under the Uniform Commercial Code, see §§ 25-8-101 to 25-8-406.

§ 32-15. Registration in the name of a fiduciary.—A corporation or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, and thereafter the corporation and its transfer agent may assume without inquiry that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longer acting as such with respect to the particular security. (1959, c. 1246, s. 2.)

§ 32-16. Assignment by a fiduciary.—Except as otherwise provided in this article, a corporation or transfer agent making a transfer of a security pursuant to an assignment by a fiduciary:

- (1) May assume without inquiry that the assignment, even though to the fiduciary himself or to his nominee, is within his authority and capacity and is not in breach of his fiduciary duties;
- (2) May assume without inquiry that the fiduciary has complied with any controlling instrument and with the law of the jurisdiction governing the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and
- (3) Is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to the fiduciary relationship or the assignment, even though the record or document is in its possession. (1959, c. 1246, s. 3.)

§ 32-17. Evidence of appointment or incumbency.—A corporation or transfer agent making a transfer pursuant to an assignment by a fiduciary who is not the registered owner shall obtain the following evidence of appointment or incumbency:

- (1) In the case of a fiduciary appointed or qualified by a court, a certificate issued by or under the direction or supervision of that court or an officer thereof and dated within sixty days before the transfer; or

(2) In any other case, a copy of a document showing the appointment or certificate issued by or on behalf of a person reasonably believed by the corporation or transfer agent to be responsible or, in the absence of such a document or certificate, other evidence reasonably deemed by the corporation or transfer agent to be appropriate. Corporations and transfer agents may adopt standards with respect to evidence of appointment or incumbency under this subdivision (2) provided such standards are not manifestly unreasonable. Neither the corporation nor transfer agent is charged with notice of the contents of any document obtained pursuant to this subdivision (2) except to the extent that the contents relate directly to the appointment or incumbency. (1959, c. 1246, s. 4.)

§ 32-18. Adverse claims.—(a) A person asserting a claim of beneficial interest adverse to the transfer of a security pursuant to an assignment by a fiduciary may give the corporation or transfer agent written notice of the claim. The corporation or transfer agent is not put on notice unless the written notice identifies the claimant, the registered owner and the issue of which the security is a part, provides an address for communications directed to the claimant and is received before the transfer. Nothing in this article relieves the corporation or transfer agent of any liability for making or refusing to make the transfer after it is so put on notice, unless it proceeds in the manner authorized in subsection

(b) As soon as practicable after the presentation of a security for transfer pursuant to an assignment by a fiduciary, a corporation or transfer agent which has received notice of a claim of beneficial interest adverse to the transfer may send notice of the presentation by registered or certified mail to the claimant at the address given by him. If the corporation or transfer agent so mails such a notice it shall withhold the transfer for thirty days after the mailing and shall then make the transfer unless restrained by a court order. (1959, c. 1246, s. 5.)

§ 32-19. Nonliability of corporation and transfer agent.—A corporation or transfer agent incurs no liability to any person by making a transfer or otherwise acting in a manner authorized by this article. (1959, c. 1246, s. 6.)

§ 32-20. Nonliability of third persons.—(a) No person who participates in the acquisition, disposition, assignment or transfer of a security by or to a fiduciary including a person who guarantees the signature of the fiduciary is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves such a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

(b) If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this article incurs no liability.

(c) This section does not impose any liability upon the corporation or its transfer agent. (1959, c. 1246, s. 7.)

§ 32-21. Territorial application.—(a) The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

(b) This article applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in this State in connection with the acquisition, disposition, assignment or transfer of a security by or to a fiduciary and of a person who guarantees in this State the

signature of a fiduciary in connection with such a transaction. (1959, c. 1246, s. 8.)

§ 32-22. Tax obligations.—This article does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession or other taxes imposed by the laws of this State. (1959, c. 1246, s. 9.)

§ 32-23. Uniformity of interpretation.—This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1959, c. 1246, s. 10.)

§ 32-24. Short title.—This article may be cited as the Uniform Act for Simplification of Fiduciary Security Transfers. (1959, c. 1246, s. 11.)

ARTICLE 3.

Powers of Fiduciaries.

§ 32-25. Definition.—As used in this article, the term "fiduciary" means the one or more executors of the estate of a decedent, or the one or more trustees of a testamentary or inter vivos trust estate, whichever in a particular case shall be appropriate. (1965, c. 628, s. 1.)

§ 32-26. Incorporation by reference of powers enumerated in § 32-27; restriction on exercise of such powers.—(a) By an expressed intention of the testator or settlor so to do contained in a will, or in an instrument in writing whereby a trust estate is created inter vivos, any or all of the powers or any portion thereof enumerated in G.S. 32-27, as they exist at the time of the signing of the will by the testator or at the time of the signing by the first settlor who signs the trust instrument, may be, by appropriate reference made thereto, incorporated in such will or other written instrument, with the same effect as though such language were set forth verbatim in the instrument. Incorporation of one or more of the powers contained in G.S. 32-27 by reference to that section shall be in addition to and not in limitation of the common law or statutory powers of the fiduciary.

(b) No power or authority conferred upon a fiduciary as provided in this article shall be exercised by such fiduciary in such a manner as, in the aggregate, to deprive the trust or the estate involved of an otherwise available tax exemption, deduction or credit, expressly including the marital deduction, or operate to impose a tax upon a donor or testator or other person as owner of any portion of the trust or estate involved. "Tax" includes, but is not limited to, any federal, state, or local income, gift, estate or inheritance tax.

(c) Nothing herein shall be construed to prevent the incorporation of the powers enumerated in G.S. 32-27 in any other kind of instrument or agreement. (1965, c. 628, s. 1.)

§ 32-27. Powers which may be incorporated by reference in trust instrument.—The following powers may be incorporated by reference as provided in G.S. 32-26:

- (1) Retain Original Property.—To retain for such time as the fiduciary shall deem advisable any property, real or personal, which the fiduciary may receive, even though the retention of such property by reason of its character, amount, proportion to the total estate or otherwise would not be appropriate for the fiduciary apart from this provision.
- (2) Sell and Exchange Property.—To sell, exchange, give options upon, partition or otherwise dispose of any property or interest therein which the fiduciary may hold from time to time, with or without order of court, at public or private sale or otherwise, upon such terms and conditions, including credit, and for such consideration as the fiduciary

ciary shall deem advisable, and to transfer and convey the property or interest therein which is at the disposal of the fiduciary, in fee simple absolute or otherwise, free of all trust; and the party dealing with the fiduciary shall not be under a duty to follow the proceeds or other consideration received by the fiduciary from such sale or exchange.

- (3) Invest and Reinvest.—To invest and reinvest, as the fiduciary shall deem advisable, in stocks (common or preferred), bonds, debentures, notes, mortgages or other securities, in or outside the United States; in insurance contracts on the life of any beneficiary or of any person in whom a beneficiary has an insurable interest, or in annuity contracts for any beneficiary, in any real or personal property, in investment trusts; in participations in common trust funds, and generally in such property as the fiduciary shall deem advisable, even though such investment shall not be of the character approved by applicable law but for this provision.
- (4) Invest Without Diversification.—To make investments which cause a greater proportion of the total property held by the fiduciary to be invested in investments of one type or of one company than would be considered appropriate for the fiduciary apart from this provision.
- (5) Continue Business.—To the extent and upon such terms and conditions and for such periods of time as the fiduciary shall deem necessary or advisable, to continue or participate in the operation of any business or other enterprise, whatever its form of organization, including but not limited to the power:
 - a. To effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;
 - b. To dispose of any interest therein or acquire the interest of others therein;
 - c. To contribute or invest additional capital thereto or to lend money thereto, in any such case upon such terms and conditions as the fiduciary shall approve from time to time;
 - d. To determine whether the liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate or trust set aside for use in the business or to the estate or trust as a whole; and
 - e. In all cases in which the fiduciary is required to file accounts in any court or in any other public office, it shall not be necessary to itemize receipts and disbursements and distributions of property but it shall be sufficient for the fiduciary to show in the account a single figure or consolidation of figures, and the fiduciary shall be permitted to account for money and property received from the business and any payments made to the business in lump sum without itemization.
- (6) Form Corporation or Other Entity.—To form a corporation or other entity and to transfer, assign, and convey to such corporation or entity all or any part of the estate or of any trust property in exchange for the stock, securities or obligations of any such corporation or entity, and to continue to hold such stock and securities and obligations.
- (7) Operate Farm.—To continue any farming operation received by the fiduciary pursuant to the will or other instrument and to do any and all things deemed advisable by the fiduciary in the management and maintenance of such farm and the production and marketing of crops and dairy, poultry, livestock, orchard and forest products including but not limited to the following powers:
 - a. To operate the farm with hired labor, tenants or sharecroppers;

- b. To lease or rent the farm for cash or for a share of the crops;
- c. To purchase or otherwise acquire farm machinery and equipment and livestock;
- d. To construct, repair, and improve farm buildings of all kinds needed in the fiduciary's judgment, for the operation of the farm;
- e. To make or obtain loans or advances at the prevailing rate or rates of interest for farm purposes such as for production, harvesting, or marketing, or for the construction, repair, or improvement of farm buildings, or for the purchase of farm machinery or equipment or livestock;
- f. To employ approved soil conservation practices in order to conserve, improve, and maintain the fertility and productivity of the soil;
- g. To protect, manage and improve the timber and forest on the farm and sell the timber and forest products when it is to the best interest of the estate;
- h. To ditch, dam and drain damp or wet fields and areas of the farm when and where needed;
- i. To engage in the production of livestock, poultry or dairy products, and to construct such fences and buildings and plant such pastures and crops as may be necessary to carry on such operations;
- j. To market the products of the farm; and
- k. In general, to employ good husbandry in the farming operation.

(8) Manage Real Property.—

- a. To improve, manage, protect, and subdivide any real property;
- b. To dedicate or withdraw from dedication parks, streets, highways, or alleys;
- c. To terminate any subdivision or part thereof;
- d. To borrow money for the purposes authorized by this subdivision for such periods of time and upon such terms and conditions as to rates, maturities and renewals as the fiduciary shall deem advisable and to mortgage or otherwise encumber any such property or part thereof, whether in possession or reversion;
- e. To lease any such property or part thereof to commence at the present or in the future, upon such terms and conditions, including options to renew or purchase, and for such period or periods of time as the fiduciary deems advisable although such period or periods may extend beyond the duration of the trust or the administration of the estate involved;
- f. To make gravel, sand, oil, gas and other mineral leases, contracts, licenses, conveyances or grants of every nature and kind which are lawful in the jurisdiction in which such property lies;
- g. To manage and improve timber and forests on such property, to sell the timber and forest products, and to make grants, leases, and contracts with respect thereto;
- h. To modify, renew or extend leases;
- i. To employ agents to rent and collect rents;
- j. To create easements and release, convey, or assign any right, title, or interest with respect to any easement on such property or part thereof;
- k. To erect, repair or renovate any building or other improvement on such property, and to remove or demolish any building or other improvement in whole or in part; and

1. To deal with any such property and every part thereof in all other ways and for such other purposes or considerations as it would be lawful for any person owning the same to deal with such property either in the same or in different ways from those specified elsewhere in this subdivision (8).
- (9) Pay Taxes and Expenses.—To pay taxes, assessments, compensation of the fiduciary, and other expenses incurred in the collection, care, administration, and protection of the trust or estate.
- (10) Receive Additional Property.—To receive additional property from any source and administer such additional property as a portion of the appropriate trust or estate under the management of the fiduciary; provided the fiduciary shall not be required to receive such property without the fiduciary's consent.
- (11) Deal with Other Trusts.—In dealing with one or more fiduciaries:
 - a. To sell property, real or personal, to, or to exchange property with, the trustee of any trust which the decedent or the settlor or his spouse or any child of his shall have created, for such estates and upon such terms and conditions as to sale price, terms of payment, and security as to the fiduciary shall seem advisable; and the fiduciary shall be under no duty to follow the proceeds of any such sale; and
 - b. To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals and securities as the fiduciary shall deem advisable from any trust created by the decedent, his spouse, or any child of his, for the purpose of paying debts of the decedent, taxes, the costs of the administration of the estate, and like charges against the estate, or any part thereof, or discharging the liability of any fiduciary thereof and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans and to renew such loans.
- (12) Borrow Money.—To borrow money for such periods of time and upon such terms and conditions as to rates, maturities, renewals, and security as the fiduciary shall deem advisable, including the power of a corporate fiduciary to borrow from its own banking department, for the purpose of paying debts, taxes, or other charges against the estate or any trust, or any part thereof, and to mortgage, pledge or otherwise encumber such portion of the estate or any trust as may be required to secure such loan or loans; and to renew existing loans either as maker or endorser.
- (13) Make Advances.—To advance money for the protection of the trust or estate, and for all expenses, losses and liabilities sustained in the administration of the trust or estate or because of the holding or ownership of any trust or estate assets, for which advances with any interest the fiduciary shall have a lien on the assets of the trust or estate as against a beneficiary.
- (14) Vote Shares.—To vote shares of stock owned by the estate or any trust at stockholders meetings in person or by special, limited, or general proxy, with or without power of substitution.
- (15) Register in Name of Nominee.—To hold a security in the name of a nominee or in other form without disclosure of the fiduciary relationship so that title to the security may pass by delivery, but the fiduciary shall be liable for any act of the nominee in connection with the stock so held.
- (16) Exercise Options, Rights, and Privileges.—To exercise all options, rights, and privileges to convert stocks, bonds, debentures, notes,

mortgages, or other property into other stocks, bonds, debentures, notes, mortgages, or other property; to subscribe for other or additional stocks, bonds, debentures, notes, mortgages, or other property; and to hold such stocks, bonds, debentures, notes, mortgages, or other property so acquired as investments of the estate or trust so long as the fiduciary shall deem advisable.

- (17) Participate in Reorganizations.—To unite with other owners of property similar to any which may be held at any time in the decedent's estate or in any trusts in carrying out any plan for the consolidation or merger, dissolution or liquidation, foreclosure, lease, or sale of the property, incorporation or reincorporation, reorganization or readjustment of the capital or financial structure of any corporation, company or association the securities of which may form any portion of an estate or trust; to become and serve as a member of a stockholders or bondholders protective committee; to deposit securities in accordance with any plan agreed upon; to pay any assessments, expenses, or sums of money that may be required for the protection or furtherance of the interest of the distributees of an estate or beneficiaries of any trust with reference to any such plan; and to receive as investments of an estate or any trust any securities issued as a result of the execution of such plan.
- (18) Reduce Interest Rates.—To reduce the interest rate from time to time on any obligation, whether secured or unsecured, constituting a part of an estate or trust.
- (19) Renew and Extend Obligations.—To continue any obligation, whether secured or unsecured, upon and after maturity with or without renewal or extension upon such terms as the fiduciary shall deem advisable, without regard to the value of the security, if any, at the time of such continuance.
- (20) Foreclose and Bid in.—To foreclose, as an incident to the collection of any bond, note or other obligation, any mortgage, deed of trust, or other lien securing such bond, note or other obligation, and to bid in the property at such foreclosure sale, or to acquire the property by deed from the mortgagor or obligor without foreclosure; and to retain the property so bid in or taken over without foreclosure.
- (21) Insure.—To carry such insurance coverage, including public liability, for such hazards and in such amounts, either in stock companies or in mutual companies, as the fiduciary shall deem advisable.
- (22) Collect.—To collect, receive, and receipt for rents, issues, profits, and income of an estate or trust.
- (23) Litigate, Compromise or Abandon.—To compromise, adjust, arbitrate, sue on or defend, abandon, or otherwise deal with and settle claims in favor of or against the estate or trust as the fiduciary shall deem advisable, and the fiduciary's decision shall be conclusive between the fiduciary and the beneficiaries of the estate or trust and the person against or for whom the claim is asserted, in the absence of fraud by such person; and in the absence of fraud, bad faith or gross negligence of the fiduciary, shall be conclusive between the fiduciary and the beneficiaries of the estate or trust.
- (24) Employ and Compensate Agents, etc.—To employ and compensate, out of income or principal or both and in such proportion as the fiduciary shall deem advisable, persons deemed by the fiduciary needful to advise or assist in the proper settlement of the estate or administration of any trust, including, but not limited to, agents, accountants, brokers, attorneys at law, attorneys in fact, investment brokers, rental agents, realtors, appraisers, and tax specialists; and to do so without

liability for any neglect, omission, misconduct, or default of such agent or representative provided he was selected and retained with due care on the part of the fiduciary.

(25) Acquire and Hold Property of Two or More Trusts Undivided.—To acquire, receive, hold and retain the principal of several trusts created by a single instrument undivided until division shall become necessary in order to make distributions; to hold, manage, invest, reinvest, and account for the several shares or parts of shares by appropriate entries in the fiduciary's books of account, and to allocate to each share or part of share its proportionate part of all receipts and expenses; provided, however, that the provisions of this subdivision shall not defer the vesting in possession of any share or part of share of the estate or trust.

(26) Establish and Maintain Reserves.—To set up proper and reasonable reserves for taxes, assessments, insurance premiums, depreciation, obsolescence, amortization, depletion of mineral or timber properties, repairs, improvements, and general maintenance of buildings or other property out of rents, profits, or other income received; and to set up reserves also for the equalization of payments to or for beneficiaries; provided, however, that the provisions of this subdivision shall not affect the ultimate interests of beneficiaries in such reserves.

(27) Distribute in Cash or Kind.—To make distribution of capital assets of the estate or trust in kind or in cash, or partially in kind and partially in cash, in divided or undivided interests, as the fiduciary finds to be most practicable and for the best interests of the distributees; and to determine the value of capital assets for the purpose of making distribution thereof if and when there be more than one distributee thereof, which determination shall be binding upon the distributees unless clearly capricious, erroneous and inequitable; provided, however, that the fiduciary shall not exercise any power under this subdivision unless the fiduciary holds title to or an interest in the property to be distributed and is required or authorized to make distribution thereof.

(28) Pay to or for Minors or Incompetents.—To make payments in money, or in property in lieu of money, to or for a minor or incompetent in any one or more of the following ways:

- a. Directly to such minor or incompetent;
- b. To apply directly in payment for the support, maintenance, education, and medical, surgical, hospital, or other institutional care of such minor or incompetent;
- c. To the legal or natural guardian of such minor or incompetent;
- d. To any other person, whether or not appointed guardian of the person by any court, who shall, in fact, have the care and custody of the person of such minor or incompetent.

The fiduciary shall not be under any duty to see to the application of the payments so made, if the fiduciary exercised due care in the selection of the person, including the minor or incompetent, to whom such payments were made; and the receipt of such person shall be full acquittance to the fiduciary.

(29) Apportion and Allocate Receipts and Expenses.—To determine:

- a. What is principal and what is income of any estate or trust and to allocate or apportion receipts and expenses as between principal and income in the exercise of the fiduciary's discretion, and, by way of illustration and not limitation of the fiduciary's discretion, to charge premiums on securities purchased at a premium against principal or income or partly against each;

- b. Whether to apply stock dividends and other noncash dividends to income or principal or apportion them as the fiduciary shall deem advisable; and
- c. What expenses, costs, taxes (other than estate, inheritance, and succession taxes and other governmental charges) shall be charged against principal or income or apportioned between principal and income and in what proportions.

(30) Make Contracts and Execute Instruments.—To make contracts and to execute instruments, under seal or otherwise, as may be necessary in the exercise of the powers herein granted. (1965, c. 628, s. 1.)

Chapter 33.

Guardian and Ward.

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ARTICLE 1.

Creation and Termination of Guardianship.

§ 33-1. Jurisdiction in clerk of superior court.—The clerks of the superior court within their respective counties have full power, from time to time, to take cognizance of all matters concerning orphans and their estates and to appoint guardians in all cases of infants, idiots, lunatics, inebriates, and inmates of the Caswell School: Provided, that guardians shall be appointed by the clerks of the superior courts in the counties in which the infants, idiots, lunatics, or inebriates reside, unless the guardians be the next of kin of such incompetents or a person designated by such next of kin in writing filed with the clerk, in which case, guardians may be appointed by the clerk of the superior court in any county in which is located a substantial part of the estates belonging to such incompetents, or unless an infant resides with an individual who is

domiciled in the State of North Carolina and who is guardian of such infant's estate, in which case a guardian of the person of such infant may be appointed by the clerk of the superior court in the county in which the guardian of such infant's estate is domiciled. Provided, further, where any adult person is declared incompetent in connection with his commitment to a mental hospital or is found to be incompetent from want of understanding to manage his affairs by reason of physical and mental weakness on account of old age, disease, or other like infirmities, the clerk may appoint a trustee in lieu of a guardian for said persons. The trustee so appointed shall be subject to the laws now or which hereafter may be enacted for the control and handling of estates by guardians. (1762, c. 69, ss. 5, 7; R. C., c. 54, s. 2; 1868-9, c. 201, s. 4; Code, s. 1566; Rev., s. 1766; 1917, c. 41, s. 1; C. S., s. 2150; 1935, c. 467; 1945, c. 902; 1953, c. 615; 1959, c. 1028, s. 5.)

Editor's Note.—

The 1953 amendment added the second proviso and the last sentence.

The 1959 amendment changed the name of "Caswell Training School" to "Caswell School."

Residence of Infant.—The word "reside" as used in this section relating to the appointment of guardians has been construed to mean the domicile of the infant. And a legitimate child, whose father is alive, takes at birth, and continues during minority, the domicile of his father—following it as it changes. Upon the death of the father his domicile at death continues to be the domicile of his minor child until the domicile of such child is legally changed. *In re Hall's Guardianship*, 235 N. C. 697, 71 S. E. (2d) 140 (1952).

§ 33-1.1. Absence of natural guardian.—Where there is no natural guardian of a minor or where a minor has been abandoned, and in either event the minor requires service from the department of public welfare, until the appointment of a guardian of the person for said minor under this chapter, the director of public welfare of the county in which such minor resides shall be the guardian of the person of said minor: Provided, however, that nothing in this section shall be construed as changing or affecting the appointment or the duties or powers of any next friend of, or any guardian or trustee of the property or estate of, any minor, or any existing laws relative to the handling or disposition of the property of any minor. (1947, c. 413, s. 3; 1961, c. 186.)

Editor's Note.—

The 1961 amendment substituted "director" for "superintendent" in line five.

§ 33-2. Appointment by parents; effect; powers and duties of guardian.

And Applies Only to Testator's Children.—

See *Johnson v. Salsbury*, 232 N. C. 432, 61 S. E. (2d) 327 (1950).

Bequest to Son as Trustee for Grandchildren.—Testatrix bequeathed certain property to her grandchildren with subsequent provisions that it was her will and desire that her son be appointed their guardian and that the guardian should hold and manage the property for the grandchil-

Where both parents of an infant are dead and he is taken to the home of his paternal grandparents and resides with them, regardless of what theretofore may have been his domicile, the domicile of his grandparents then becomes his domicile. Hence, the clerk of superior court of the county in which the grandparents reside has jurisdiction of him. *In re Hall's Guardianship*, 235 N. C. 697, 71 S. E. (2d) 140 (1952).

Termination of Guardianship When Ward Reaches Majority.—When one is appointed as guardian for a minor, his right to act terminates when the ward reaches his majority. *In re Simmons*, 256 N. C. 184, 123 S. E. 2d) 614 (1962).

dren with power to sell, convey or exchange the securities. It was held that since testatrix could not appoint a testamentary guardian for her grandchildren the provisions will be interpreted as bequeathing the property to testatrix' son as trustee for testatrix' grandchildren, in order that each provision of the instrument be given effect consistent with testatrix' intention. *Johnson v. Salsbury*, 232 N. C. 432, 61 S. E. (2d) 327 (1950).

§ 33-3. Mother's guardianship on death of father.

Quoted in part in *In re Hall's Guardianship*, 235 N. C. 697, 71 S. E. (2d) 140 (1952).

§ 33-6. Separate appointment for person and estate; yearly support specified; payments allowed in accounting.

Stated in *In re Hall's Guardianship*, 235 N. C. 697, 71 S. E. (2d) 140 (1952).

§ 33-6.1. Payment of debts and obligations of wards incurred prior to date of adjudication of incompetency.—The clerk of the superior court may in his discretion authorize the guardian or trustee of the estate of any incompetent, including an inebriate, for whom a guardian or trustee has been appointed, to pay debts and obligations of wards incurred prior to the date of adjudication of incompetency for necessary living expenses, taxes, and specific liens on real or personal property if the clerk is satisfied that the incompetent or inebriate has an equity in such property on which there is a specific lien. (1955, c. 290, s. 1.)

Editor's Note.—Section 2 of the act inserting this section validated all such disbursements made prior to March 23, 1955, by a guardian or trustee of an estate of an

incompetent or inebriate upon orders of or with the approval of a clerk of the superior court or a superior court judge.

§ 33-7. Proceedings on application for guardianship.—On application to any clerk of the superior court for the custody and guardianship of any infant, idiot, inebriate, lunatic, or inmate of the Caswell School, it is the duty of such clerk to inform himself of the circumstances of the case on the oath of the applicant, or of any other person, and if none of the relatives of the infant, idiot, inebriate, lunatic, or inmate of the Caswell School are present at such application, the clerk must assign, or for any other good cause he may assign, a day for the hearing; and he shall thereupon direct notice thereof to be given to such of the relatives and to such other persons, if any, as he may deem it proper to notify. On the hearing he shall ascertain, on oath, the amount of the property, real and personal, of the infant, idiot, inebriate, lunatic, or inmate of the Caswell School, and the value of the rents and profits of the real estate, and he may grant or refuse the application, or commit the guardianship to some other person, as he may think best for the interest of the infant, idiot, inebriate, lunatic, or inmate of the Caswell School. (C. C. P., s. 474; Code, s. 1620; Rev., s. 1772; 1917, c. 41, s. 2; C. S., s. 2156; 1959, c. 1028, s. 5.)

Editor's Note.—The 1959 amendment changed the name of "Caswell Training School" to "Caswell School."

§ 33-9. Removal by clerk.—The clerks of the superior court have power and authority on information or complaint made to remove any fiduciaries appointed under the provisions of this chapter, and to appoint successors, to make and establish rules for the better ordering, managing, and securing estates for which fiduciaries have been appointed and for the better education and maintenance of wards and their dependents; and it is their duty to do so in the following cases:

- (1) Where the fiduciary wastes or converts the money or the estate of the ward to his own use.
- (2) Where the fiduciary in any manner mismanages the estate.
- (3) Where the fiduciary neglects to educate or maintain the ward or his dependents in a manner suitable to their degree.
- (4) Where the fiduciary would be legally disqualified to be appointed administrator.

(5) Where the fiduciary or his sureties are likely to become insolvent or are likely to become nonresidents of the State. (1762, c. 69; R. C., c. 54, ss. 2, 13; C. C. P., ss. 470, 476; 1868-9, c. 201, s. 20; Code, s. 1583; Rev., s. 1774; C. S., s. 2158; 1955, c. 970.)

Editor's Note.—The 1955 amendment, which became effective July 1, 1955, rewrote this section.

ARTICLE 2.

Guardian's Bond.

§ 33-12. Bond to be given before receiving property.

Quoted in *State Trust Co. v. Toms*, 244 N. C. 645, 94 S. E. (2d) 806 (1956).

ARTICLE 3.

Powers and Duties of Guardian.

§ 33-20. Guardian to take charge of estate.

Miscellaneous Matters.—

Court had jurisdiction under this section to determine guardian's petition relative to acceptance of settlement of ward's interest in partnership under contemplated organization of corporation to take over assets of partnership, since matter involved

was not a sale, lease or mortgage of ward's property cognizable under §§ 35-10 and 35-11. In re Edwards, 243 N. C. 70, 89 S. E. (2d) 746 (1955).

Stated in *Teel v. Kerr*, 261 N.C. 148, 134 S.E.2d 126 (1964).

§ 33-23. When guardians to cultivate lands of wards.—Where any parent of a minor child or any person standing in loco parentis or any member of the family of such child with whom such child resides qualifies as guardian of such child, and the ward owns or is entitled to the possession of any real estate used or which may be used for agricultural purposes, such guardian may make application to the clerk of the superior court of the county wherein the land is situate for permission to cultivate it, and the petition shall set forth the nature, extent and location of the same. It shall then be the duty of the clerk to appoint three disinterested resident freeholders, who shall go upon the land and, after being sworn to act impartially, assess the annual rental value thereof. The commissioners shall report their proceedings and findings to the clerk within ten days after the notification of their appointment, and if the clerk shall deem the same to be the interest of the ward he shall make an order allowing the guardian to cultivate the land for a term not exceeding three years at the annual rental value assessed by the commissioners to be paid to the ward by the guardian. The term, however, shall not extend beyond the minority of the minor. The commissioners shall receive as compensation for said services the same fees as are allowed commissioners in partition of real estate. (1909, c. 57; C. S., s. 2173; 1951, c. 424.)

Editor's Note.—The 1951 amendment inserted after the word "child" in line two the words "or any person standing in loco parentis or any member of the family of such child with whom such child resides."

ARTICLE 4.

Sales of Ward's Estate.

§ 33-31. Special proceedings to sell; judge's approval required.—On application of the guardian or ancillary guardian appointed pursuant to G. S. 33-31.2, by petition, verified upon oath, to the superior court, showing that the interest of the ward would be materially promoted by the sale or mortgage of any part of his estate, real or personal, the proceeding shall be con-

ducted as in other cases of special proceedings; and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may thereupon be made that a sale or mortgage be had by such person, in such way and on such terms as may be most advantageous to the interest of the ward; all petitions filed under the authority of this section wherein an order is sought for the sale or mortgage of the ward's real estate or both real and personal property shall be filed in the superior court of the county in which all or any part of the real estate is situated; if the order of sale demanded in the petition is for the sale or mortgage of the ward's personal estate, the petition may be filed in the superior court of the county in which any or all of such personal estate is situated; no mortgage shall be made until approved by the judge of the court, nor shall the same be valid, nor any conveyance of the title made, unless confirmed and directed by the judge, and the proceeds of the sale or mortgage shall be exclusively applied and secured to such purposes and on such trusts as the judge shall specify. The guardian may not mortgage the property of his ward for a term of years in excess of the term fixed by the court in its decree. The word "mortgage" whenever used herein shall be construed to include deeds in trust. Nothing herein contained shall be construed to divest the court of the power to order private sales as heretofore ordered in proper cases. The procedure for a sale pursuant to this section shall be provided by article 29A of chapter 1 of the General Statutes. (1827, c. 33; R. C., c. 54, ss. 32, 33; 1868-9, c. 201, s. 39; Code, s. 1602; Rev., s. 1798; 1917, c. 258, s. 1; C. S., s. 2180; 1923, c. 67, s. 1; 1945, c. 426, s. 1; c. 1084, s. 1; 1949, c. 719, s. 2; 1951, c. 366, s. 2.)

Editor's Note. — The 1951 amendment inserted the words "or ancillary guardian appointed pursuant to G. S. 33-31.2" near the beginning of the section. Cited in *Brown v. Cowper*, 247 N. C. 1, 100 S. E. (2d) 305 (1957).

§ 33-31.2. Ancillary guardian for nonresident infant having real property in State.—Whenever it shall appear by petition, application, and due proof to the satisfaction of any clerk of the superior court of North Carolina that:

(1) There is real property situated in the county of said clerk in which a nonresident of the State of North Carolina has an interest or estate;

(2) That said nonresident is an infant and that a guardian has been appointed and is still serving for him or her in the State of his or her residence; and

(3) That such nonresident infant has no guardian in the State of North Carolina:

Such clerk of the superior court before whom such petition, application and satisfactory proof is made shall thereupon be fully authorized and empowered to appoint in his county an ancillary guardian, which guardian shall have all the powers, duties and responsibilities with respect to the estate of said infant in the State of North Carolina as guardians otherwise appointed now have; and such ancillary guardian shall annually make an accounting to the court in this State and remit to the guardian in the state of the ward's residence any net rents of said real estate, or any proceeds of sale, to the guardian of the state of residence of said infant.

Upon the appointment of an ancillary guardian in this State under this article, the clerk of the superior court shall forthwith notify the clerk of the superior, or other corresponding court of the county of the ward's residence, and shall also notify the guardian in the state of the ward's residence. (1951, c. 366, s. 1.)

§ 33-32. Fund from sale has character of estate sold and subject to same trusts.

Proceeds of Sale of Land Retain Character of Real Estate.—When an undivided interest of an insane person in land was sold by his guardian under court order, the proceeds of sale retained the character of real estate for the purpose of devolu-

tion on his death intestate while still insane, and would go as his interest in the land would had it not been sold. *Brown v. Cowper*, 247 N. C. 1, 100 S. E. (2d) 305 (1957).

Purchase Back of Identical Real Prop-

erty Sold.—In view of the general rule as to the sale of an insane person's real property under a court order, and in view of this section, a conveyance of real property by the guardian of an insane person and the purchase back of the identical real property at a foreclosure sale by the use of unpaid purchase money notes would not break the line of descent. *Brown v. Cowper*, 247 N. C. 1, 100 S. E. (2d) 305 (1957).

Exchange of Real Property for Real Property.—This section does not in explicit words refer to the case where real property is substituted for real property. However, considering the general rule as

to the sale of an insane person's real property under a court order, and the purpose and intent of this section, an undivided interest in land conveyed to an insane person in exchange for his interest in other tracts of land transmitted to him by descent from his mother would, upon his death intestate and continuously insane since before the appointment of his guardian until his death, nothing else appearing, descend as by law his undivided interest in the other tracts would descend, if his undivided interest in the other tracts of land had not been sold, conveyed and exchanged. *Brown v. Cowper*, 247 N. C. 1, 100 S. E. (2d) 305 (1957).

ARTICLE 5.

Returns and Accounting.

§ 33-39. Annual accounts.—Every guardian shall, within thirty days after the expiration of one year from the date of his qualification or appointment, and annually, so long as any of the estate remains in his control, file in the office of the clerk of the superior court an inventory and account, under oath, of the amount of property received by him, or invested by him, and the manner and nature of such investment, and his receipts and disbursements for the past year in the form of debit and credit. He must produce vouchers for all payments. The clerk of the superior court may examine on oath such accounting party, or any other person, concerning the receipts, disbursements or any other matter relating to the estate; and having carefully revised and audited such account, if he approve the same, he must indorse his approval thereon, which shall be deemed *prima facie* evidence of correctness. (1762, c. 69, ss. 9, 15; R. C., c. 54, ss. 11, 12; 1871-2, c. 46; Code, s. 1617; Rev., s. 1805; C. S., s. 2186; 1965, c. 802.)

Editor's Note. — The 1965 amendment substituted "thirty days after the expiration of one year" for "twelve months" near the beginning of the first sentence.

§ 33-41. Final account. — A guardian may be required to file such account at any time after sixty days from the ward's coming of full age or the cessation of the guardianship; but such account may be filed voluntarily at any time, and, whether the accounting be voluntary or compulsory, it shall be audited and recorded by the clerk of the superior court. (C. C. P., s. 481; Code, s. 1619; Rev., s. 1807; C. S., s. 2188; 1965, c. 411.)

Editor's Note. — The 1965 amendment substituted "sixty days" for "six months."

§ 33-42.1. Guardian to exhibit investments and bank statements.—At the time the accounts required by this article and other provisions of law are filed, the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance, and the clerk of the superior court shall certify on the original account that an examination was made of all investments and the cash balance, and that the same are correctly stated in the account: Provided, such examination may be made by the clerk of the superior court of the county in which such guardian resides or the county in which such securities are located and, when the guardian is a duly authorized bank or trust company, such examination may be made by the clerk of the superior court of the county in which such bank or trust company has its principal office or in which such securities are located; the certificate of the clerk of the superior court of such county shall be accepted by the clerk of the superior court of any county in which such guardian is required

to file an account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirements of this section, when a certificate executed by a trust examiner employed by a governmental unit is exhibited to the clerk of the superior court and when said certificate shows that the securities held by the fiduciary have been examined within one year. (1947, c. 596; 1961, cc. 292, 1066.)

Editor's Note.—The first 1961 amendment added the first proviso. The second 1961 amendment added the second proviso.

ARTICLE 7.

Foreign Guardians.

§ 33-48. Right to removal of infant's or ward's personality from State.—Where any infant, ward, idiot, lunatic or insane person, residing in another state or territory, or in the District of Columbia, or Canada, or other foreign country, is entitled to any personal estate in this State, or personal property substituted for realty by decree of court, or to any money arising from the sale of real estate whether the same be in the hands of any guardian residing in this State, or of any executor, administrator or other person holding for the infant, ward, idiot, lunatic or insane person, or if the same (not being adversely held and claimed) be not in the lawful possession or control of any person, the guardian or trustee of the infant, ward, idiot, lunatic or insane person, duly appointed at the place where such infant, ward, idiot, lunatic or insane person resides, or in the event no guardian or trustee has been appointed the court or officer of the court authorized by the laws of the state or territory or for the District of Columbia or Canada or other foreign country to receive moneys belonging to any infants, idiots, lunatics or insane persons when no guardian or trustee has been appointed for such person, may apply to have such estate removed to the residence of the infant, idiot, lunatic or insane person by petition filed before the clerk of the superior court of the county in which the property or some portion thereof is situated which shall be proceeded with as in other cases of special proceedings. (1820, c. 1044; 1842, c. 38; R. C., c. 54, s. 29; 1868-9, c. 201, ss. 35, 38; 1874-5, c. 168; Code, ss. 1598, 1601; Rev., s. 1816; 1913, c. 86, s. 1; C. S., s. 2195; 1937, c. 307; 1963, c. 999, s. 1.)

Editor's Note.—

The 1963 amendment, effective July 1, 1963, inserted the words "infant" and "or" trustee" several times in this section. **Cited in Johnson v. Salsbury, 232 N. C. 432, 61 S. E. (2d) 327 (1950).**

§ 33-49. Contents of petition; parties defendant. — The petitioner must show to the court a copy of his appointment as guardian or trustee and bond duly authenticated, and must prove to the court that the bond is sufficient, as well in the ability of the sureties as in the sum mentioned therein, to secure all the estate of the infant or ward wherever situated: Provided, that in all cases where a banking institution, resident and doing business in a foreign state, is a guardian or trustee of any person or infant and such banking institution is not required to execute a bond to qualify as guardian or trustee under the laws of the state wherein said guardian or trustee qualified and was appointed guardian or trustee of such infant, or infants, and no sureties are or were required by the state in which said banking institution qualified as guardian or trustee, and this fact affirmatively appears to the court, then the personal property and estate of such infant or other person, may be removed from this State without the finding of a court with reference to any sureties, and the court in which the petition for the removal of the property of the infant or ward is filed may order the transfer and removal of the property of the infant or ward, and the payment

and delivery of the same to the nonresident guardian or trustee of said infant or ward without regard to whether a nonresident guardian or trustee has filed a bond with sureties; and the finding of the court that the said guardian or trustee is a banking institution and has duly qualified and been appointed guardian or trustee of said infant or ward under the laws of the state where said infant or ward, or wards, is or are residents, shall be sufficient. Any person may be made a party defendant to the proceeding who may be made a party defendant in civil actions under the provisions of the chapter entitled Civil Procedure. (1820, c. 1044, s. 2; 1842, c. 38; R. C., c. 54, s. 30; 1868-9, c. 201, ss. 36, 37; Code, ss. 1599, 1600; Rev., ss. 1817, 1818; C. S., s. 2196; 1949, c. 253; 1963, c. 999, s. 2.)

Editor's Note.—

The 1963 amendment, effective July 1, 1963, inserted the words "infant or" and "or trustee" several times in this section.

§ 33-49.1. Transfer of guardianship.—When any ward, mental defective, mentally disordered person, or cestui que trust, for whom a guardian or trustee has been appointed, lives in a county in this State other than the county in which letters were issued to such guardian or in which such trustee was appointed, the trustee or guardian may, by petition filed with the clerk of court of the county in which letters were issued or in which he was appointed, transfer the guardianship or trusteeship to the county of the residence of the ward, mental defective, mentally disordered person, or cestui que trust. Upon the removal of such guardianship or trusteeship, the clerk of the court of the county to which it is removed shall have the same powers and authority as he would have had if he had originally issued the letters of guardianship or appointed the trustee, and all reports and accounts required by law to be filed by the guardian or trustee shall be filed with the clerk of the court of the county to which such guardianship or trusteeship is removed. (1945, c. 194; 1961, c. 973.)

Editor's Note.—The 1961 amendment and eight and deleted "or" before "men-
inserted "or cestui que trust" in lines two tally" in said lines.

ARTICLE 9.

Guardians of Estates of Missing Persons.

§§ 33-56 to 33-62: Repealed by Session Laws 1965, c. 815, s. 4.

ARTICLE 10.

Conservators of Estates of Missing Persons.

§§ 33-63 to 33-66: Repealed by Session Laws 1965, c. 815, s. 4.

ARTICLE 12.

Gifts of Securities and Money to Minors.

§ 33-68. Definitions.—In this article, unless the context otherwise requires:

- (a) An "adult" is a person who has attained the age of twenty-one years.
- (b) A "bank" is a bank, savings and loan association, building and loan association, federal savings and loan association, trust company, national banking association, savings bank, industrial bank.
- (c) A "broker" is a person lawfully engaged in the business of effecting transactions in securities for the account of others. The term includes a bank which effects such transactions. The term also includes a person lawfully engaged in buying and selling securities for his own account, through a broker or otherwise, as a part of a regular business.

(d) "Court" means the superior court of the several counties of the State.

(e) "The custodial property" includes:

- (1) All securities, money and life insurance under the supervision of the same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in this article.
- (2) The income from the custodial property; and
- (3) The proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment or other disposition of such securities, money and income.

(f) A "custodian" is a person so designated in a manner prescribed in this article.

(g) A "guardian" of a minor includes the general guardian, guardian, tutor or curator of his property, estate or person.

(h) An "issuer" is a person who places or authorizes the placing of his name on a security (other than as a transfer agent) to evidence that it represents a share, participation or other interest in his property or in an enterprise or to evidence his duty or undertaking to perform an obligation evidenced by the security, or who becomes responsible for or in place of any such person.

(i) A "legal representative" of a person is his executor or the administrator, general guardian, guardian, committee, conservator, tutor or curator of his property or estate.

(j) A "member" of a "minor's family" means any of the minor's parents, grandparents, great-grandparents, brothers, sisters, uncles and aunts, whether of the whole blood or the half blood, or by or through legal adoption.

(k) A "minor" is a person who has not attained the age of twenty-one years.

(l) A "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation in, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing. The term does not include a security of which the donor is the issuer. A security is in "registered form" when it specifies a person entitled to it or to the rights it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.

(m) A "transfer agent" is a person who acts as authenticating trustee, transfer agent, registrar or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities or in the cancellation of surrendered securities.

(n) A "trust company" is a bank authorized to exercise trust powers in the State of North Carolina.

(o) "Life insurance" shall be deemed to include only insurance on the life of a minor or a member of the minor's family as herein defined. (1955, c. 1061; 1959, c. 1166, s. 1.)

Editor's Note. — This article, originally containing seven sections, was rewritten by the 1959 amendment to contain ten sections.

Section 2 of the amendatory act provides that the rewriting of this article does not affect gifts made in a manner prescribed in the original article nor the powers, duties and immunities conferred by gifts in such manner upon custodians and persons dealing with custodians. The provisions of this act henceforth apply, however, to all gifts made in a manner and form prescribed in the original article hereby rewritten except insofar as such application impairs constitutionally vested rights. The sections of this act shall be construed as a continuation of the provisions of the original article hereby rewritten.

§ 33-69. Manner of making gift. — (a) An adult person may, during his lifetime, make a gift of a security, money, or life insurance, to a person who is a minor on the date of the gift.

(1) If the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person, an adult member of the minor's family, a guardian of the minor, or a trust company, followed, in substance, by the words: "as custodian for under the North Carolina Uniform Gifts to Minors Act";

(2) If the subject of the gift is a security not in registered form, by delivering it to an adult person other than the donor, an adult member, other than the donor, of the minor's family, a guardian of the minor, or a trust company, accompanied by a statement of gift in the following form, in substance, signed by the donor and the person designated as custodian:

"GIFT UNDER THE NORTH CAROLINA UNIFORM GIFTS TO MINORS ACT"

I, , hereby deliver to
 (name of donor) (name of custodian)
 as custodian for under the North Carolina
 (name of minor)

Uniform Gifts to Minors Act, the following security(ies): (insert an appropriate description of the security or securities delivered sufficient to identify it or them).

.....
 (signature of donor)
 hereby acknowledges receipt of the above
 (name of custodian)
 described security(ies) as custodian for the above minor under the
 North Carolina Uniform Gifts to Minors Act.

Dated: (signature of custodian)"

(3) If the subject of the gift is money, by paying or delivering it to a broker or a bank for credit to an account in the name of the donor, another adult person, an adult member of the minor's family, a guardian of the minor or a bank with trust powers, followed, in substance, by the words: "as custodian for under the North Carolina Uniform Gifts to Minors Act".

(4) If the subject of the gift is life insurance, the ownership of the policy of life insurance shall be registered by the donor of such policy in his own name or in the name of an adult member of the minor's family or in the name of any guardian of the minor, followed by the words: "as custodian for under the North Carolina Uniform Gifts to Minors Act", and such policy of life insurance shall be delivered to the person in whose name it is thus registered as custodian. If the policy is registered in the name of the donor, as custodian, such registration shall of itself constitute the delivery required by this section.

(b) Any gift made in a manner prescribed in subsection (a) may be made to only one minor and only one person may be the custodian.

(c) A donor who makes a gift to a minor in a manner prescribed in subsection (a) shall promptly do all things within his power to put the subject of the gift in the possession and control of the custodian, but neither the donor's failure to comply with this subsection, nor his designation of an ineligible person as custodian, nor renunciation by the person designated as custodian affects the consummation of the gift. (1955, c. 1061; 1959, c. 1166, s. 1.)

§ 33-70. Effect of gift.—(a) A gift made in a manner prescribed in this article is irrevocable and conveys to the minor indefeasibly vested legal title to the security, money, or life insurance given, but no guardian of the minor has any right, power, duty or authority with respect to the custodial property except as provided in this article.

(b) By making a gift in a manner prescribed in this article, the donor incorporates in his gift all the provisions of this article and grants to the custodian, and to any issuer, transfer agent, bank, broker or third person dealing with a person designated as custodian, the respective powers, rights and immunities provided in this article. (1959, c. 1166, s. 1.)

§ 33-71. Duties and powers of custodian.—(a) The custodian shall collect, hold, manage, invest and reinvest the custodial property.

(b) The custodian shall pay over to the minor for expenditure by him, or expend for the minor's benefit, so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(c) The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of fourteen years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance or education.

(d) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of twenty-one years or, if the minor dies before attaining the age of twenty-one years, he shall thereupon deliver or pay it over to the estate of the minor.

(e) The custodian, notwithstanding statutes restricting investments by fiduciaries, shall invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital, except that he may, in his discretion and without liability to the minor or his estate, retain a security given to the minor in a manner prescribed in this article. The custodian may also use funds in his custody to purchase a policy or policies of life insurance on the life of the minor and to pay premiums thereon, and to retain and use funds in his custody to pay premiums on a policy or policies of life insurance given to the minor in accordance with the provisions of G.S. 33-69 (a) (4).

(f) The custodian may sell, exchange, convert or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices and upon the terms he deems advisable. He may vote in person or by general or limited proxy a security which is custodial property. He may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of an issuer, a security which is custodial property, and to the sale, lease, pledge or mortgage of any property by or to such an issuer, and to any other action by such an issuer. He may execute and deliver any and all instruments in writing which he deems advisable to carry out any of his powers as custodian.

(g) The custodian shall register each security which is custodial property and in registered form in the name of the custodian, followed, in substance, by the words: "as custodian for under the North

(name of minor)

Carolina Uniform Gifts to Minors Act" The custodian shall hold all money which is custodial property in an account with a broker or in a bank in the

name of the custodian, followed, in substance, by the words: "as custodian for under the North Carolina Uniform Gifts to
(name of minor)

Minors Act". The custodian shall keep all other custodial property separate and distinct from his own property in a manner to identify it clearly as custodial property.

(h) The custodian shall keep records of all transactions with respect to the custodial property and make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if he has attained the age of fourteen years.

(i) A custodian has and holds as powers in trust with respect to the custodial property, in addition to the rights and powers provided in this article, all the rights and powers which a guardian has with respect to property not held as custodial property.

(j) If the subject of the gift is life insurance, the custodian shall have all of the incidents of ownership in the life insurance policy which he may hold as custodian to the same extent as if he were the owner thereof personally. The designated beneficiary of any such policy of insurance held by a custodian shall be the minor or, in the event of his death, the minor's estate. (1955, c. 1061; 1959, c. 1166, s. 1; 1961, c. 477.)

(j) All life insurance policies held by the custodian whether acquired under G.S. 33-69 (a) (4) or G.S. 33-71 (e) shall be registered in the name of the custodian as owner "as custodian for
(name of minor)

North Carolina Uniform Gifts to Minors Act." The custodian shall have and may exercise as custodian all of the incidents of ownership in such life insurance policies to the same extent as if he were the owner thereof personally, including, but not limited to, the right to borrow on such policies for the payment of premiums. If a life insurance policy is issued on the life of the minor, the designated beneficiary shall be the minor's estate. If a life insurance policy is issued on the life of a person other than the minor, the beneficiary shall be the custodian, or, if the custodianship has ceased, the minor, or, in the event of the minor's death, the minor's estate. (1955, c. 1061; 1959, c. 1166, s. 1; 1961, c. 477; 1965, c. 992.)

Editor's Note. — The 1961 amendment added to subsection (e) the provision for the investment of custodian funds in life insurance. The 1965 amendment rewrote that portion of subsection (e) which follows "article" at the end of the present first sentence therein and rewrote subsection (j).

§ 33-72. Custodian's expenses, compensation, bond and liabilities.

—(a) A custodian is entitled to reimbursement from the custodial property for his reasonable expenses incurred in the performance of his duties.

(b) A custodian may act without compensation for his services.

(c) Unless he is a donor, a custodian may receive from the custodial property reasonable compensation for his services determined by one of the following standards in the order stated:

- (1) A direction by the donor when the gift is made;
- (2) A statute of this State applicable to custodian;
- (3) The statute of this State applicable to guardians;
- (4) An order of the court.

(d) Except as otherwise provided in this article, a custodian shall not be required to give a bond for the performance of his duties.

(e) A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this article. (1959, c. 1166, s. 1.)

§ 33-73. Exemption of third persons from liability.—No issuer, transfer agent, bank, broker or other person acting on the instructions of or otherwise dealing with any person purporting to act as a donor or in the capacity of a custodian is responsible for determining whether the person designated by the purported donor or purporting to act as a custodian has been duly designated or whether any purchase, sale or transfer to or by or any other act of any person purporting to act in the capacity of custodian is in accordance with or authorized by this article, or is obliged to inquire into the validity or propriety under this article of any instrument or instructions executed or given by a person purporting to act as a donor or in the capacity of a custodian, or is bound to see to the application by any person purporting to act in the capacity of a custodian of any money or other property paid or delivered to him. (1959, c. 1166, s. 1.)

§ 33-74. Resignation, death or removal of custodian; bond; appointment of successor custodian. — (a) Only an adult member of the minor's family, a guardian of the minor or a trust company is eligible to become successor custodian. A successor custodian has all the rights, powers, duties and immunities of a custodian designated in a manner prescribed by this article.

(b) A custodian, other than the donor, may resign and designate his successor by:

(c) A custodian, whether or not a donor, may petition the court for permission to resign and for the designation of a successor custodian.

(d) If the person designated as custodian is not eligible, renounces or dies before the minor attains the age of twenty-one years, the guardian of the minor shall be successor custodian. If the minor has no guardian, a donor, his legal representative, the legal representative of the custodian, an adult member of the minor's family, or the minor, if he has attained the age of fourteen years, may petition the court for the designation of a successor custodian.

(e) A donor, the legal representative of a donor, an adult member of the minor's family, a guardian of the minor or the minor, if he has attained the age of fourteen years, may petition the court that, for cause shown in the petition, the custodian be removed and a successor custodian be designated or, in the alternative, that the custodian be required to give bond for the performance of his duties.

(f) Upon the filing of a petition as provided in this section, the court shall grant an order, directed to the persons and returnable on such notice as the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant such relief as the court finds to be in the best interests of the minor. (1955, c. 1061; 1959, c. 1166, s. 1.)

§ 33-75. Accounting by custodian.—(a) The minor, if he has attained the age of fourteen years, or the legal representative of the minor, an adult member of the minor's family, or a donor or his legal representative may petition the court for an accounting by the custodian or his legal representative.

(b) The court, in a proceeding under this article or otherwise, may require

or permit the custodian or his legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer thereof. (1955, c. 1061; 1959, c. 1166, s. 1.)

§ 33-76. Construction. — (a) This article shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(b) This article shall not be construed as providing an exclusive method for making gifts to minors. (1959, c. 1166, s. 1.)

§ 33-77. Short title.—This article may be cited as the "North Carolina Uniform Gifts to Minors Act." (1955, c. 1061; 1959, c. 1166, s. 1.)

Chapter 34.

Veterans' Guardianship Act.

Sec.

34-2.1. Guardian's powers as to property; validation of prior acts. Sec. 34-14.1. Payment of veterans' benefits to relatives.

§ 34-2. Definitions.—In this chapter:

The term "person" includes a partnership, corporation or an association.

The term "Bureau" means the United States Veterans' Bureau or its successor.

"Income" means moneys received from the Veterans Administration and revenue or profit from any property wholly or partially acquired therewith.

"Estate" means income on hand and assets acquired partially or wholly with "income".

The term "benefits" shall mean all moneys payable by the United States through the Bureau.

The term "Director" means the Director of the United States Veterans' Bureau or his successor.

The term "ward" means a beneficiary of the Bureau.

The term "guardian" as used herein shall mean any person acting as a fiduciary for a ward. (1929, c. 33, s. 2; 1945, c. 723, s. 2; 1961, c. 396, s. 1.)

Editor's Note.—

The 1961 amendment rewrote the provisions as to "income" and "estate."

§ 34-2.1. Guardian's powers as to property; validation of prior acts. — Any guardian appointed under the provisions of this chapter may be guardian of all property, real or personal, belonging to the ward to the same extent as a guardian appointed under the provisions of chapter 33 or chapter 35 of the General Statutes of North Carolina, as the case may be, and the provisions of such chapters concerning the custody, management and disposal of property shall apply in any case not provided for by this chapter. All acts heretofore performed by guardians appointed under the provisions of this chapter with respect to the custody, management and disposal of property of wards are hereby validated where no provision for such acts was provided for by this chapter, if such acts were performed under and in conformity with the provisions of chapter 33 or chapter 35 of the General Statutes of North Carolina, as the case may be. (1955, c. 1272, s. 1.)

§ 34-10. Guardian's accounts to be filed; hearing on accounts. — Every guardian, who shall receive on account of his ward any moneys from the Bureau, shall file with the court annually, on the anniversary date of the appointment, in addition to such other accounts as may be required by the court,

a full, true, and accurate account under oath of all moneys so received by him, of all disbursements thereof, and showing the balance thereof in his hands at the date of such account and how invested. A certified copy of each of such accounts filed with the court shall be sent by the guardian to the office of the Bureau having jurisdiction over the area in which such court is located.

At the time such account is filed the clerk of the superior court shall require the guardian to exhibit to the court all investments and bank statements showing cash balance and the clerk of the superior court shall certify on the original account and the certified copy which the guardian sends the Bureau that an examination was made of all investments and cash balance and that same are correctly stated in the account; provided that banks, organized under the laws of North Carolina or the Acts of Congress, engaged in doing a trust and fiduciary business in this State, when acting as guardian, or in other fiduciary capacity, shall be exempt from the requirement of exhibiting such investments and bank statements, and the clerk of the superior court shall not be required to so certify as to the accounts of such banks, except that in addition to the officers verifying the account, there shall be added a certificate of other officers of the bank certifying that all assets referred to in the account are held by the guardian. If objections are raised to such an accounting, the court shall fix a time and place for the hearing thereon not less than fifteen days nor more than thirty days from the date of filing such objections, and notice shall be given by the court to the aforesaid Bureau office and the North Carolina Veterans Commission by mail not less than fifteen days prior to the date fixed for the hearing. Notice of such hearing shall also be given to the guardian. (1929, c. 33, s. 10; 1933, c. 262, s. 1; 1945, c. 723, s. 2; 1961, c. 396, s. 2.)

Editor's Note.— to the first sentence of the second paragraph.
The 1961 amendment added the proviso

§ 34-13. Investment of funds.—Every guardian shall invest the funds of the estate in any of the following securities:

- (1) United States government bonds.
- (2) State of North Carolina bonds issued since the year one thousand eight hundred seventy-two.
- (3) By loaning the same upon real estate securities in which the guardian has no interest, such loans not to exceed fifty per cent (50%) of the actual appraised or assessed value, whichever may be lower, and said loans when made to be evidenced by a note, or notes, or bond, or bonds, under seal of the borrower and secured by first mortgage or first deed of trust. Said guardian before making such investment on real estate mortgages shall secure a certificate of title from some reputable attorney certifying that the same is the first lien on real estate and also setting forth the tax valuation thereof for the current year: Provided, said guardian may purchase with said funds a home or farm for the sole use of said ward or his dependents upon petition and order of the clerk of superior court, said order to be approved by the resident or presiding judge of the superior court, and provided further that copy of said petition shall be forwarded to said Bureau before consideration thereof by said court.
- (4) By investing the funds of the estate in a savings account, or savings share account, or optional savings share account, or stock of any federal savings and loan association organized under the laws of the United States and located in the State of North Carolina or of any building or savings and loan association organized and licensed under the laws of this State, to the extent that such investment is insured by the Federal Savings and Loan Insurance Corporation.
- (5) By depositing the funds either in a savings account in any federally

insured bank in North Carolina or by purchasing a certificate of deposit issued by any federally insured bank in North Carolina.

It shall be the duty of guardians who shall have funds invested other than as provided for in this section to liquidate same within one year from the passage of this law: Provided, however, that upon the approval of the judge of the superior court, either residing in or presiding over the courts of the district, the clerk of the superior court may authorize the guardian to extend from time to time, the time for sale or collection of any such investments; that no extension shall be made to cover a period of more than one year from the time the extension is made.

The clerk of the superior court of any county in the State or any guardian who shall violate any of the provisions of this section shall be guilty of a misdemeanor, punishable by fine or imprisonment or both in the discretion of the court. (1929, c. 33, s. 13; 1933, c. 262, s. 2; 1957, c. 199; 1959, c. 1015, s. 1.)

Editor's Note.—The 1957 amendment The 1959 amendment inserted para-
inserted the paragraph designated (4). graph (5).

§ 34-14. Application of ward's estate.—A guardian may apply any income received from the Veterans Administration for the benefit of the ward in the same manner and to the same extent as other income of the estate without the necessity of securing an order of court. A guardian shall not apply any portion of the estate of his ward for the support and maintenance of any person other than his ward, except upon order of the court after a hearing, notice of which has been given the proper officer of the Bureau and the North Carolina Veterans Commission in the manner provided in § 34-10. (1929, c. 33, s. 14; 1945, c. 723, s. 2; 1961, c. 396, s. 3.)

Editor's Note.—

The 1961 amendment added the first sentence.

§ 34-14.1. Payment of veterans' benefits to relatives.—(a) It shall be lawful for a guardian or trustee of a mentally disordered or incompetent Veterans' Administration beneficiary to pay to or for (1) the spouse or children or mother or father of the ward, whether or not said spouse or children or mother or father received any part of their maintenance from the ward prior to the appointment of said guardian or trustee, such an amount for support and maintenance as shall be approved by the clerk of the superior court having jurisdiction over such guardian or trustee; (2) a brother, sister, nephew, niece, uncle, aunt, or any other relative of the ward, who, prior to the appointment of said guardian or trustee, received some part of his or her maintenance from said ward, such an amount for support and maintenance as shall be approved by the clerk of the superior court having jurisdiction over said guardian or trustee and by a superior court judge.

(b) Such approval may be granted upon a duly verified petition filed before the clerk of the superior court having jurisdiction of such guardian or trustees setting forth (1) the amount of benefits received by the guardian or trustee on behalf of the ward from the Veterans' Administration; (2) the amount of periodic disbursements, if any, made by such guardian or trustee for the maintenance and support of the ward; (3) the person for whose maintenance and support payment is to be made and the relationship of such person to the ward; (4) if the person for whose maintenance and support payment is to be made is one described in paragraph (a) (2) above, facts showing that prior to the appointment of said guardian or trustee such person received some part of his or her maintenance from said ward; (5) the amount to be paid and the period when such payments are to be made. Notice of hearing upon such petition shall be as provided by G. S. 34-14, and no person or persons, other than the guardian or trustees and petitioner, need to be made parties to any such proceeding. If

the guardian or trustee is the petitioner, no other parties shall be necessary. (1945, c. 479, ss. 1, 2; 1953, c. 122, s. 1; 1955, c. 1272, s. 2.)

Editor's Note. — The 1953 amendment changed the former definition of "relative." Section 2 of the amendatory act validated all orders made prior to February 20, 1953, for the payment to any dependent relative pursuant to the provisions of § 34-14.1 as hereby amended, if otherwise valid.

§ 34-17. Discharge of guardian. — When a minor ward for whom a guardian has been appointed under the provisions of this chapter or other laws of this State shall have attained his or her majority, and if incompetent shall be declared competent by the Bureau and by an order of the clerk of the superior court of the county in which such guardian was appointed, and when any incompetent ward, not a minor, shall be declared competent by said Bureau and by an order of the clerk of the superior court of the county in which such guardian was appointed, the guardian shall upon making a satisfactory accounting be discharged upon a petition filed for that purpose. The certificate of the Director, or his representative, setting forth the fact that an incompetent ward has been rated competent by the Bureau on examination in accordance with the laws and regulations governing such Bureau shall be *prima facie* evidence upon which the court may declare such ward competent. (1929, c. 33, s. 17; 1955, c. 1272, s. 3.)

Editor's Note. — The 1955 amendment added the second sentence and rewrote a part of the first sentence. The amendatory act validated all orders entered prior to May 25, 1955, by the clerk of the superior court of the county in which such guardian was appointed declaring such ward to

be competent, based on a certificate of the Director, or his representative, that such incompetent ward had been rated competent by the Bureau on examination in accordance with the laws and regulations governing such Bureau.

Chapter 35.

Persons with Mental Diseases and Incompetents.

Article 2.

Guardianship and Management of Estates of Incompetents.

Sec.

35-3. Guardian appointed on certificate from hospital for insane or training school.

Article 3.

Sales of Estates.

35-12. [Repealed.]

Article 5A.

Gifts from Income for Certain Purposes.

35-29.1. Gifts authorized with approval of judge of superior court.

35-29.2. Prerequisites to approval by judge.

35-29.3. Fact that incompetent had not previously made similar gifts.

35-29.4. Validity of gift.

Article 5B.

Gifts from Principal for Certain Purposes.

Sec.

35-29.5. Gifts authorized with approval of judge of superior court.

35-29.6. Prerequisites to approval by judge.

35-29.7. Who deemed specific and residuary legatees and devisees of incompetent under § 35-29.6.

35-29.8. Notice to minors and incompetents under § 35-29.6.

35-29.9. Objections to proposed gift; fact that incompetent had previously made similar gifts.

35-29.10. Validity of gift.

Article 5C.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

35-29.11. Declaration and gift for certain

Sec.

purposes authorized with approval of judge of superior court.
 35-29.12. Prerequisites to approval of gift.
 35-29.13. Who deemed specific and residuary legatees and devisees of incompetent under § 35-29.12.
 35-29.14. Notice to minors and incompetents under § 35-29.12.
 35-29.15. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.
 35-29.16. Validity of declaration and gift.

Article 6.**Detention, Treatment, and Cure of Inebriates.**

35-30 to 35-35.2. [Repealed.]

Article 7.**Sterilization of Persons Mentally Defective.**

35-40. Eugenics Board created; membership, etc.

Article 8.**Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.**

35-58 to 35-60. [Repealed.]

§ 35-1. Inebriates defined.

Cross Reference.—For other definition, see § 35-30.

This chapter deals only with inebriates and mental incompetents in matters of a civil nature. There is no provision therein for the commitment or discharge of a per-

§ 35-1.1. Definitions of mental disease, mental defective, etc.
A cerebral hemorrhage is a mental illness within the meaning of this section, and in an inquisition of lunacy in which there is no evidence of mental incapacity other than that resulting from a cerebral

Article 9.**Mental Health Council.**

Sec.
 35-61 to 35-63. [Transferred.]

Article 10.**Interstate Compact on Mental Health.**

35-64 to 35-69. [Transferred.]

Article 11.**Medical Advisory Council to State Board of Mental Health.**

35-70. Creation of Council; membership; terms; vacancies.
 35-71. Per diem and allowances of members.
 35-72. Duties.

Article 12.**Council on Mental Retardation.**

35-73. Creation of Council; membership; terms; chairman.
 35-74. Function of Council; meetings; annual report to Governor.
 35-75. Per diem and allowances of members.
 35-76. Members of Council as State officials.
 35-77. Payment of operating expenses.

ARTICLE 1.*Definitions.*

son who stands indicted, charged with the commission of a felony, who pleads that he is incapable for the want of understanding to plead to the bill of indictment or prepare his defense. *In re Tate*, 239 N. C. 94, 79 S. E. (2d) 259 (1953).

disease, mental defective, etc.
A cerebral hemorrhage, a charge defining mental incapacity in the language of this section is without error. *In re Humphrey*, 238 N. C. 141, 71 S. E. (2d) 915 (1952).

ARTICLE 2.*Guardianship and Management of Estates of Incompetents.***§ 35-2. Inquisition of lunacy; appointment of guardian.**

The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same; and he shall proceed to appoint a guardian of any person so found to be a mental defective, inebriate, mentally disordered or incompetent person by inquisition of a jury as in cases of orphans. If the person

so adjudged incompetent shall be an inebriate within the definition of § 35-1, the clerk shall proceed to commit said inebriate to the department for inebriates at the State Hospital at Raleigh for treatment and cure. He shall forward to the superintendent of said State hospital a copy of the record required herein to be made, together with the commitment, and these shall constitute the authority to said superintendent to receive and care for such said inebriate. The expenses of the care and cure of said inebriate shall constitute a charge against the estate in the care of his guardian. If, however, such estate is not large enough to pay such expenses, the same shall be a valid charge against the county from which said inebriate is sent. Provided, where the person is found to be incompetent from want of understanding to manage his affairs, by reason of physical and mental weakness on account of old age and/or disease and/or other like infirmities, the clerk may appoint a trustee instead of guardian for said person. The trustee or guardian appointed shall be vested with all the powers of a guardian administering an estate for any person and shall be subject to all the laws governing the administration of estates of minors and incompetents. The clerks of the superior courts who have heretofore appointed guardians for persons described in this proviso are hereby authorized and empowered to change said appointment from guardian to trustee. The sheriffs of the several counties to whom a process is directed under the provisions of this section shall serve the same without demanding their fees in advance. And the juries of the several counties upon whom a process is served under the provisions of this section shall serve and make their returns without demanding their fees in advance. (C. C. P., s. 473; Code, s. 1670; Rev., s. 1890; 1919, c. 54; C. S., s. 2285; 1921, c. 156, s. 1; 1929, c. 203, s. 1; 1933, c. 192; 1945, c. 952, s. 3; 1951, c. 777.)

Local Modification.—Guilford: 1965, c. 444, amending 1945, c. 102.

Cross Reference.—

As to right of alleged incompetent to examine his will left in a sealed envelope with the clerk, see note to § 31-11.

Editor's Note.—The 1951 amendment rewrote the seventh sentence of the third paragraph. As the first and second paragraphs were not changed they are not set out.

Nature of Proceeding.—An inquisition of lunacy as regards the person whose sanity is in question is a proceeding in personam; as it affects his property is a proceeding in rem. Such an inquisition is certainly not a criminal action as contemplated by G. S. 1-5. It is not a civil action as defined in G. S. 1-2. And by G. S. 1-3 "every other remedy is a special proceeding." Certainly such an inquisition is of a civil nature, though it would seem it is not a special proceeding under G. S. 1-3. In re Dunn, 239 N. C. 378, 79 S. E. (2d) 921 (1954).

§ 35-3. Guardian appointed on certificate from hospital for insane or training school.—If any person is confined in any State, territorial or governmental asylum or hospital for the insane in this State or State training school or in any other state or territory, or in the District of Columbia, or in any hospital licensed and supervised by the State of North Carolina, the certificate of the superintendent of such hospital or training school declaring such person to be of insane mind and memory or mentally retarded, which certificate shall be sworn to and subscribed before the clerk of the superior court or any notary

Conclusiveness of Adjudication.—

An adjudication of insanity is conclusive as to the parties to the proceeding and their privies, but as to others it is evidence of incompetency and raises a mere presumption to that effect which is not conclusive but may be rebutted. Medical College of Virginia v. Maynard, 236 N. C. 506, 73 S. E. (2d) 315 (1952).

An adjudication of mental incompetency raises no presumption of mental incapacity antedating the adjudication. At most it is merely evidence to be considered by the jury on the issue of mental incapacity and it must not be unreasonably remote in time. In re Knight's Will, 250 N. C. 634, 109 S. E. (2d) 470 (1959).

Applied in In re Humphrey, 236 N. C. 141, 71 S. E. (2d) 915 (1952); In re Gamble, 244 N. C. 149, 93 S. E. (2d) 66 (1956).

Quoted in Brown v. Guaranty Estates Corp., 239 N. C. 595, 80 S. E. (2d) 615 (1954); In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

public, or the clerk of any court of record in the county, in which such hospital or training school is situated and certified under the seal of court, shall be sufficient evidence to authorize the clerk to appoint a guardian for such idiot, lunatic or insane person. Further, the clerks of the different counties of this State are also authorized to appoint guardians for any person entitled to the benefits of the War Risk Insurance Act, as amended, and the World War Veterans' Act of nineteen hundred and twenty-four, as amended, where it shall appear from the certificate of the Regional Medical Officer of the United States Veterans' Bureau of North Carolina that such veteran of the World War has been declared by the United States Government as incompetent to receive the funds to be paid to him under said Acts of Congress, and such certificate shall be all the proof required as to the incapacity of said veteran to receive such funds and as to the necessity of a guardian. Guardians for such veterans shall be subject to the same provisions of law as guardians of idiots, ineptates, lunatics, and incompetent persons in this State.

Any guardian or trustee appointed prior to April 3, 1939, under the provisions of this section on certificate issued by the superintendent of any hospital licensed and supervised by the State of North Carolina, and any and all proceedings based thereon are hereby validated. (1860-1, c. 22; Code, s. 1673; Rev., ss. 1891, 4609; 1907, c. 232; C. S., s. 2286; 1927, c. 160, s. 1; 1939, c. 330; 1953, c. 675, s. 31; 1959, c. 1001; 1963, c. 1184, s. 37.)

Editor's Note.—

The 1953 amendment inserted the words "the clerk" immediately following the word "authorize" near the end of the first sentence.

The 1959 amendment inserted the words "or State training school" in line two. It also inserted at two places in the first sentence the words "or training

school."

The 1963 amendment, effective July 1, 1963, inserted "or mentally retarded" after the word "memory" near the middle of the first sentence.

Applied in *In re Dunn*, 239 N. C. 378, 79 S. E. (2d) 921 (1954); *In re Wilson*, 257 N. C. 593, 126 S. E. (2d) 489 (1962).

§ 35-4. Restoration to sanity or sobriety; effect; how determined; appeal. — When any insane person or ineptate becomes of sound mind and memory, or becomes competent to manage his property, he is authorized to manage, sell and control all his property in as full and ample a manner as he could do before he became insane or ineptate, and a petition in behalf of such person may be filed before the clerk of the superior court of the county of his residence; provided, however, that in all cases where a guardian has been appointed the cause of action shall be tried in the county where the guardianship is pending, and said guardian shall be made a party to such action before final determination thereof, setting forth the facts, duly verified by the oath of the petitioner (the petition may be filed by the person formerly adjudged to be insane, lunatic, ineptate or incompetent; or by any friend or relative of said person; or by the guardian of said person), whereupon the clerk shall issue an order, upon notice to the person alleged to be no longer insane or ineptate, to the sheriff of the county, commanding him to summon a jury of six freeholders to inquire into the sanity of the alleged sane person, formerly a lunatic, or the sobriety of such alleged restored person, formerly an ineptate. The jury shall make return of their proceedings under their hands to the clerk, who shall file and record the same, and if the jury find that the person whose mental or physical condition inquired of is sane and of sound mind and memory, or is no longer an ineptate, as the case may be, the said person is authorized to manage his affairs, make contracts and sell his property, both real and personal, as if he had never been insane or ineptate. The petitioner may appeal from the finding of said jury to the next term of the superior court, when the matters at issue shall be regularly tried de novo before a jury. (1879, c. 324, s. 4; Code, s. 1672;

1901, c. 191; 1903, c. 80; Rev., s. 1893; C. S., s. 2287; 1937, c. 311; 1941, c. 145; 1949, c. 124; 1955, c. 691.)

Local Modification. — Guilford: 1965, c. 444, amending 1945, c. 102.

Editor's Note. — The 1955 amendment struck out the words "or before the clerk of the superior court of the county wherein such person is confined or held" formerly appearing in line six after the word "residence".

For note on guardianship and restoration to sanity, see 41 N. C. Law Rev. 279.

Section May Not Be Invoked by Person

§ 35-4.1. Discharge of guardian by clerk on testimony of one or more practicing physicians.

Applied in *In re Wilson*, 257 N. C. 593, 126 S. E. (2d) 489 (1962), commented on in 41 N. C. Law Rev. 279.

§ 35-5. Legal rights restored upon certificate of sanity by superintendent of hospital. — Any person who has been declared of unsound mind and memory under § 35-3, and for whom a guardian has been appointed, may be fully restored to his rights to manage his or her property by a certificate from the superintendent of the hospital where such person of unsound mind and memory has been confined stating that such insane person has been restored to sound mind and memory. This certificate shall be sworn to and subscribed before the clerk of the superior court or a notary public for the county in which the hospital wherein such person had been confined is located. The clerk of such resident county shall record the certificate and immediately issue a notice to the guardian of such person, requiring him to file his final account within sixty days from the date of service of the notice. From the date of docketing the record of such certificate the person formerly of unsound mind and memory shall be restored to all his legal rights (1909, c. 176; C. S., s. 2288; 1953, c. 256, s. 10.)

Editor's Note. — The 1953 amendment deleted part of the second sentence.

ARTICLE 3.

Sales of Estates.

§ 35-10. Clerk may order sale, renting or mortgage.

Editor's Note. —

The words "sale of mortgage" in line seventeen of this section in the recompiled volume should read "sale or mort-

gage."

Cited in *In re Edwards*, 243 N. C. 70, 89 S. E. (2d) 746 (1955).

§ 35-11. Purposes for which estate sold or mortgaged; parties; disposition of proceeds.

Cited in *In re Edwards*, 243 N. C. 70, 89 S. E. (2d) 746 (1955).

§ 35-12: Repealed by Session Laws 1965, c. 854.

ARTICLE 4.

Mortgage or Sale of Estates Held by the Entireties.

§ 35-14. Where one spouse or both incompetent; special proceeding before clerk.

Stated in *Woolard v. Smith*, 244 N. C. 489, 94 S. E. (2d) 466 (1956).

§ 35-15. General law applicable; approved by judge.

Sale May Be Authorized.—This section does not limit the court's power to authorizing a mortgage. The court may authorize a sale. *Perry v. Jolly*, 259 N. C. 306, 130 S. E. (2d) 654 (1963).

And Transfers Right of Survivorship to

Fund.—A sale does not destroy or separate the interests of the tenants by entireties if one of the parties is incompetent. The right of survivorship is transferred to the fund. *Perry v. Jolly*, 259 N. C. 306, 130 S. E. (2d) 654 (1963).

§ 35-17. Clerk may direct application of funds; purchasers and mortgagees protected.

The discretion given the court by this section is limited to the protection of the incompetent's interests. *Perry v. Jolly*, 259 N. C. 306, 130 S. E. (2d) 654 (1963).

The power to dissolve the rights of sur-

vivorship incident to the entireties estate is not within the court's discretion. *Perry v. Jolly*, 259 N. C. 306, 130 S. E. (2d) 654 (1963).

ARTICLE 5.*Surplus Income and Advancements.***§ 35-20. Advancement of surplus income to certain relatives.**

History of §§ 35-20 to 35-27.—See *Ford v. Security Nat. Bank*, 249 N. C. 141, 105 S. E. (2d) 421 (1958).

§ 35-21. Advancement to adult child or grandchild.

Findings Sufficient to Support Order for Advancements.—Finding to the effect that an incompetent was incurably insane, that his estate was greatly in excess of any needs for his support, hospitalization and maintenance, that his adult children were in dire financial need, and that advancements to them from their father's

estate under this section would operate for the better promotion and advancement in life of the children, support an order directing advancements to be made to the children out of the surplus estate of the incompetent. *Ford v. Security Nat. Bank*, 249 N. C. 141, 105 S. E. (2d) 421 (1958).

§ 35-22. For what purpose and to whom advanced.

Evidence Showing Need and Proper Purpose for Advancements.—Where the impoverished condition of an incompetent's adult children and the adequacy of his estate were not challenged, and while the order for advancements did not restrict the use of the funds to the purchase of a home, the applicants had re-

quested advancements for that purpose, it was held that the evidence demonstrated a need and a proper purpose for advancements, and was sufficient to support the findings and the judgment. *Ford v. Security Nat. Bank*, 249 N. C. 141, 105 S. E. (2d) 421 (1958).

§ 35-23. Distributees to be parties to proceeding for advancements.

In a proceeding requesting an increase in the allowance to the dependent of a permanently insane veteran, all persons who would be entitled to a distributive

share of the estate in case of death are necessary parties under this section. *Patrick v. Branch Banking & Trust Co.*, 241 N. C. 76, 84 S. E. (2d) 277 (1954).

§ 35-26. Advancements to be secured against waste.

Order Not Reversed Because Advancements Not Secured Against Waste.—An order under § 35-21 would not be held erroneous for want of direction in the order securing the advancements from being wasted, where the finding that the ad-

vancements would operate for the better promotion in life of the children was supported by evidence, even though it might later turn out that the advancements were wasted. *Ford v. Security Nat. Bank*, 249 N. C. 141, 105 S. E. (2d) 421 (1958).

§ 35-28. Advancements only when insanity permanent.

Veterans Administration Is Proper Party to Proceeding.—In a proceeding requesting an increase in the allowance of a permanently insane veteran, the Veterans

Administration is a proper party under this section and § 35-29. *Patrick v. Branch Banking & Trust Co.*, 241 N. C. 76, 84 S. E. (2d) 277 (1954).

§ 35-29. Decrees suspended upon restoration of sanity.

Cross Reference.—See note to § 35-28.

ARTICLE 5A.

Gifts from Income for Certain Purposes.

§ 35-29.1. Gifts authorized with approval of judge of superior court.

—With the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition the guardian or trustee of a person judicially declared to be incompetent may, from the income of the incompetent, make gifts to the State of North Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 111, s. 1.)

Editor's Note.—For comment on gifts by guardian from estate of incompetent ward, see 43 N.C.L. Rev. 616 (1965).

Article Limits Power of Trustee or Guardian to Make Gifts.—This and the following two articles limit the power of a guardian or a trustee to make gifts of the character enumerated therein. He may do so only with the approval of the resident judge of the superior court of the county in which the guardian or trustee was appointed. To secure approval, the guardian or trustee must file a verified petition setting out what authority he wishes and the reasons justifying his request. *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

Income or Corpus of Incompetent's Estate Cannot Be Taken Except for His Support or Debts.—A court of equity may not, either in the exercise of its inherent jurisdiction or with legislative sanction granted by §§ 35-29.1, 35-29.4, 39-29.5, 39-29.10, 39-29.11 and 39-29.16, authorize the taking of income or corpus of the estate of an incompetent for a purpose other than the incompetent's own support and the discharge of the incompetent's legal obligations. *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

Thus, Court May Not Authorize Gift Because It Believes Gift Should Be Made.—To authorize a gift from an incompetent's estate "if the court under all of the circumstances believes that such gift should be made," would permit the court to do that which the lunatic had not done and would not do if sane. Such an order would amount to a taking of property in deroga-

tion of lunatic's constitutional rights. *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

But Proposed Act by Trustee Need Not Enhance Ward's Estate.—No court should authorize a guardian, or trustee, of an estate of an incompetent to act in a manner which will prove detrimental to the estate of his ward; but it does not follow that the proposed action must be one which benefits or enhances the estate of the ward. *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

And Gifts of Income or Principal May Be Authorized.—While an incompetent's property may not, either with legislative sanction or court order, be taken for charitable purposes notwithstanding the part not taken is ample for incompetent's needs, it is nonetheless true that courts of equity have authorized the gift of a part of incompetent's income or principal. *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

On Finding Incompetent Would Probably Have Made Gift If Sane.—A court may authorize a fiduciary to make a gift of a part of the estate of an incompetent only on a finding, on a preponderance of the evidence, at a hearing of which interested parties have notice, that the lunatic, if then of sound mind, would make the gift. *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964); *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

What it is necessary to establish is that the act proposed by the trustee of an incompetent is "that which it is probable the lunatic would himself have done," or

"as it is probable he would have acted for himself, if he were of sound mind." *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35-29.2. Prerequisites to approval by judge.—The judge shall not approve such gifts unless it appears to his satisfaction that:

- (1) After the making of such gifts and the payment of federal and State income taxes, the remaining income of the incompetent will be reasonable and adequate to provide for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gifts, of expenditures for the incompetent's support, maintenance, comfort and welfare);
- (2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (3) Each donee is a donee qualified to receive tax deductible gifts under federal and State income tax laws;
- (4) The aggregate of such gifts does not exceed the percentage of income fixed by federal law as the maximum deduction allowable for such gifts in computing federal income tax liability. (1963, c. 111, s. 2.)

Cited in *In re Trusteeship of Kenan*, 261 N.C. 1, 134 S.E.2d 85 (1964).

§ 35-29.3. Fact that incompetent had not previously made similar gifts.—The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 111, s. 3.)

§ 35-29.4. Validity of gift.—A gift made with the approval of the judge under the provisions of this article shall be deemed a gift by the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 111, s. 4.)

Cross Reference.—See note to § 35-29.1.

ARTICLE 5B.

Gifts from Principal for Certain Purposes.

§ 35-29.5. Gifts authorized with approval of judge of superior court.—With the approval of the resident judge of the superior court of the district in which the guardian or trustee was appointed upon a duly verified petition, the guardian or trustee of a person judicially declared to be incompetent may, from the principal of the incompetent's estate, make gifts to the State of North Carolina, its agencies, counties or municipalities, or the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 112, s. 1.)

Article Limits Power of Guardian or Trustee to Make Gifts.—See note to § 35-29.1. When Gift May Be Authorized.—See note to § 35-29.1.

§ 35-29.6. Prerequisites to approval by judge.—The judge shall not approve such gifts unless it appears to his satisfaction that:

- (1) The making of such gifts will not leave the incompetent's remaining principal estate insufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to

maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life;

- (2) Each donee is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (3) Each donee is a donee qualified to receive tax-deductible gifts under federal and State income tax laws;
- (4) The making of such gifts will not jeopardize the rights of any creditor of the incompetent; and
- (5) It is improbable that the incompetent will recover competency during his or her lifetime;
- (6) Either:
 - a. 1. The incompetent, prior to being declared incompetent, executed a paper writing, with the formalities required by the laws of North Carolina for the execution of a valid will;
 2. specific legacies, bequests or devices of specific amounts of money, income or property included in such paper writing will not be jeopardized by making such gifts;
 3. all residuary legatees and devisees designated in such paper writing, who would take under the paper writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts and such paper writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of superior court of the county in which the guardian or trustee was appointed, within the ten-day period;
 - b. 1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and
 2. all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed, within the ten-day period.

(1963, c. 112, s. 2.)

The proceeding under this article is in personam. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And the incompetent and her guardian are the only necessary parties. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Section Requires Notice to Those Who May Benefit on Incompetent's Death.—This section makes a condition precedent to the judge's approval "at least ten (10) days written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would

be heirs and distributees if the incompetent died intestate contemporaneously with the filing of the petition. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And They Are Given Opportunity to Present Facts to Court.—This section recognizes the contingent or potential interest of those who would probably benefit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then incom-

petent, would probably not act as the trustee proposes to act. *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

But They Are Not Parties to Trustee's Proceeding.—Those named as beneficiaries in an incompetent's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are

not parties, and this section does not purport to make them parties, to a proceeding initiated by the trustee. *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

Personal Service of Notice outside State.
—See *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

Cited in In re Trusteeship of Kenan, 261 N.C. 1, 134 S.E.2d 85 (1964).

§ 35-29.7. Who deemed specific and residuary legatees and devisees of incompetent under § 35-29.6.—For purposes of § 35-29.6 (6) a of this article, if such paper writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific legatees and devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary legatees and devisees who would take under the paper writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee and devisee. (1963, c. 112, s. 3.)

§ 35-29.8. Notice to minors and incompetents under § 35-29.6.—If any person, to whom notice must be given under the provisions of § 35-29.6 (6) of this article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 112, s. 4.)

§ 35-29.9. Objections to proposed gift; fact that incompetent had previously made similar gifts.—If any objection is filed by one to whom notice has been given under the terms of this article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 112, s. 5.)

§ 35-29.10. Validity of gift.—A gift made with the approval of the judge under the provisions of this article shall be deemed to be a gift made by the incompetent, and shall be as valid in all respects as if made by a competent person. (1963, c. 112, s. 6.)

Cross Reference.—See note to § 35-29.1.

ARTICLE 5C.

Declaring Revocable Trust Irrevocable and Making Gift of Incompetent's Life Interest Therein.

§ 35-29.11. Declaration and gift for certain purposes authorized with approval of judge of superior court.—When a person has created a revocable trust, reserving the income for life, and thereafter has been judicially declared to be incompetent, the guardian or trustee of such incompetent, with the approval of the resident judge of the superior court of the district in which he was appointed, upon a duly verified petition may declare the trust to be irrevocable and make a gift of the life interest of the incompetent to the State of North Carolina.

Carolina, its agencies, counties or municipalities, or to the United States or its agencies or instrumentalities, or for religious, charitable, literary, scientific, historical, medical or educational purposes. (1963, c. 113, s. 1.)

Article Limits Power of Guardian or Trustee to Make Gifts.—See note to § 35-29.1.

When Gift May Be Authorized.—See note to § 35-29.1.

Modification of Trust Does Not Rewrite Contract.—Modification of a trust by making it irrevocable and donating the income

for the life of the incompetent trustor to certain designated charities does not rewrite the contract so as to affect the rights of the ultimate beneficiaries, but merely authorizes the trustees to do those things which the trustor, if competent, would probably have done. *In re Kenan*, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35 29.12. Prerequisites to approval of gift.—The judge shall not approve the gift unless it appears to his satisfaction that:

- (1) It is improbable that the incompetent will recover competency during his or her lifetime;
- (2) The estate of the incompetent, after making the gift and after payment of any gift taxes which may be incurred by reason of the declaration of irrevocability, will be sufficient to provide reasonable and adequate income for the support, maintenance, comfort and welfare of the incompetent and those legally entitled to support from the incompetent in order to maintain the incompetent and such dependents in the manner to which the incompetent and such dependents are accustomed and in keeping with their station in life (and in no event less than twice the average, for the five calendar years preceding the calendar year of such gift, of expenditures for the incompetent's support, maintenance, comfort and welfare);
- (3) Each donee of any part of the life interest is a donee to which a competent donor could make a gift, without limit as to amount, without incurring federal or State gift tax liability;
- (4) Each donee of any part of the life interest is a donee qualified to receive tax-deductible gifts under federal and State income tax laws.
- (5) Either:
 - a. 1. The incompetent, prior to being declared incompetent, executed a paper writing, with the formalities required by the laws of North Carolina for the execution of a valid will;
 2. specific legacies, bequests or devises of specific amounts of money, income or property included in such paper writing, will not be jeopardized by making such gifts;
 3. all residuary legatees and devisees designated in such paper writing, who would take under the paper writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts, and such paper writing was probated as the incompetent's will and the spouse, if any, of such incompetent have been given at least ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of superior court, of the county in which the guardian or trustee was appointed, within the ten-day period; or
 - b. 1. That so far as is known the incompetent has not prior to being declared incompetent, executed a will which could be probated upon the death of the incompetent; and
 2. all persons who would share in the incompetent's estate, if the incompetent died contemporaneously with the signing of the order of approval, have been given at least

ten days' written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed, within the ten-day period. (1963, c. 113, s. 2.)

The proceeding under this article is in personam. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And the incompetent and her guardian are the only necessary parties. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Section Requires Notice to Those Who May Benefit on Incompetent's Death.—This section makes a condition precedent to the judge's approval "at least ten (10) days written notice that approval for such gifts will be sought and that objection may be filed with the clerk of the superior court, of the county in which the guardian or trustee was appointed," to those named as legatees or devisees, if incompetent has executed a will, or to those who would be heirs and distributees if the incompetent died intestate contemporaneously with the filing of the petition. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

And They Are Given Opportunity to Present Facts to Court.—This section recognizes the contingent or potential interest of those who would probably benefit

fit financially by the death of an incompetent; and, because of their interest, notice must be given to them. Those who must have notice are given an opportunity to present to the court facts which will assist the court in determining whether the action proposed by the trustee is detrimental to the estate of the incompetent, or whether the incompetent, if then incompetent, would probably not act as the trustee proposes to act. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

But They Are Not Parties to Trustee's Proceeding.—Those named as beneficiaries in an incompetent's will have no interest in her properties so long as she lives. They take at her death only such properties as she then owns. They are not parties, and this section does not purport to make them parties, to a proceeding initiated by the trustee. In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

Personal Service of Notice outside State.—See In re Kenan, 262 N.C. 627, 138 S.E.2d 547 (1964).

§ 35-29.13. Who deemed specific and residuary legatees and devisees of incompetent under § 35-29.12.—For purposes of § 35-29.12 (5) a of this article, if such paper writing provides for the residuary estate to be placed in trust for a term of years, with stated amounts of income payable to designated beneficiaries during the term and stated amounts payable to designated beneficiaries upon termination of the trust, such designated beneficiaries shall be deemed to be specific legatees and devisees and those taking the remaining income of the trust and, at the end of the term, the remaining principal shall be deemed to be residuary legatees or devisees who would take under the paper writing if the incompetent died contemporaneously with the signing of the order of approval of such gifts. In no case shall any prospective executor or trustee be considered either a specific or residuary legatee or devisee. (1963, c. 113, s. 3.)

§ 35-29.14. Notice to minors and incompetents under § 35-29.12.—If any person, to whom notice must be given under the provisions of § 35-29.12 (5) of this article, is a minor or is incompetent, then the notice shall be given to his duly appointed guardian or other duly appointed representative: Provided, that if a minor or incompetent has no such guardian or representative, then a guardian ad litem shall be appointed by the judge and such guardian ad litem shall be given the notice herein required. (1963, c. 113, s. 4.)

§ 35-29.15. Objections to proposed declaration and gift; fact that incompetent had not previously made similar gifts.—If any objection is filed by one to whom notice has been given under the terms of this article, the clerk shall bring it to the attention of the judge, who shall hear the same, and determine the validity and materiality of such objection and make his order accordingly. If no such objection is filed, the judge shall include a finding to that effect in such order as he may make. The judge shall not withhold his approval

merely because the incompetent, prior to becoming incompetent, had not made gifts to the same donees or other gifts similar in amount or type. (1963, c. 113, s. 5.)

§ 35-29.16. Validity of declaration and gift. — Such declaration and gift, when made with the approval of the judge and under the provisions of this article, shall be deemed to be the declaration and gift of the incompetent and shall be as valid in all respects as if made by a competent person. (1963, c. 113, s. 6.)

Cross Reference.—See note to § 35-29.1.

ARTICLE 6.

Detention, Treatment, and Cure of Inebriates.

§§ 35-30 to 35-35.2: Repealed by Session Laws 1963, c. 1184, s. 35, effective July 1, 1963.

ARTICLE 7.

Sterilization of Persons Mentally Defective.

§ 35-37. Operations on mental defectives not in institutions.—It shall be the duty of the board of commissioners of any county of North Carolina, at the public cost and expense, to have one of the operations described in § 35-36, performed upon any mentally diseased, feeble-minded or epileptic resident of the county, not an inmate of any public institution, upon the request and petition of the director of public welfare or other similar public official performing in whole or in part the functions of such director, or of the next of kin, or the legal guardian of such mentally defective person: Provided, however, that no operation described in this section shall be lawful unless and until the provisions of this article shall be first complied with. (1933, c. 224, s. 2; 1961, c. 186.)

Editor's Note. — The 1961 amendment substituted "director" for "superintendent" in lines six and seven.

§ 35-38. Restrictions on such operations.—No operation under this article shall be performed by other than a duly qualified and registered North Carolina physician or surgeon, and by him only upon a written order signed after complete compliance with the procedure outlined in this article by the responsible executive head of the institution or board, or the director of public welfare, or other similar official performing in whole or in part the functions of such director, or the next of kin or legal guardian having custody or charge of the feeble-minded, mentally defective or epileptic inmate, patient or noninstitutional individual. (1933, c. 224, s. 3; 1961, c. 186.)

Editor's Note. — The 1961 amendment substituted "director" for "superintendent" in lines five and six.

§ 35-39. Prosecutors designated; duties.—If the person upon whom the operation is to be performed is an inmate or patient of one of the institutions mentioned in § 35-36, the executive head of such institution or his duly authorized agent shall act as prosecutor of the case. The county director of public welfare may act as prosecutor or petitioner in instituting sterilization proceedings in the case of any feeble-minded, epileptic, or mentally diseased person who is on parole from a State institution, and in the case of any such person who is an inmate of a State institution, when authorized to do so by the superintendent of such institution. If the person upon whom the operation is to be performed is an inmate or patient of a charitable or penal institution supported by the county, the executive head of such institution or his duly authorized agent, or the county director of welfare or such other official performing in whole or in part the func-

tions of such director of the county in which such county institution is situated, shall act as petitioner in instituting proceedings before the Eugenics Board. If the person to be operated upon is not an inmate of any such public institution, then the director of welfare or such other official performing in whole or in part the functions of such director of the county of which said inmate, patient, or noninstitutional individual to be sterilized is a resident, shall be the prosecutor. It shall be the duty of such prosecutor promptly to institute proceedings as provided by this article in any of the following circumstances:

- (1) When in his opinion it is for the best interest of the mental, moral or physical improvement of the patient inmate, or noninstitutional individual, that he or she be operated upon.
- (2) When in his opinion it is for the public good that such patient, inmate or noninstitutional individual be operated upon.
- (3) When in his opinion such patient, inmate, or noninstitutional individual would be likely, unless operated upon, to procreate a child or children who would have a tendency to serious physical, mental, or nervous disease or deficiency.
- (4) When requested to do so in writing by the next of kin or legal guardian of such patient, inmate or noninstitutional individual.
- (5) In all cases as provided for in § 35-55. (1933, c. 224, s. 4; 1935, c. 463, s. 1; 1937, c. 243; 1961, c. 186.)

Editor's Note.—

The 1961 amendment substituted "di- rector" for "superintendent" at five places in the first paragraph.

§ 35-40. Eugenics Board created; membership, etc.—There is hereby created the Eugenics Board of North Carolina. All proceedings under this article shall be begun before the said Eugenics Board. This Board shall consist of five members and shall be composed of:

- (1) The Commissioner of Public Welfare of North Carolina,
- (2) The State Health Director,
- (3) The chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina
- (4) The chief medical officer of the State Department of Mental Health,
- (5) The Attorney General of the State of North Carolina.

Any one of those officials may for the purpose of a single hearing delegate his power to act as a member of said Board to an assistant: Provided, said delegation is made in writing, to be included as a part of the permanent record in said case. The said Board shall from time to time elect a chairman from its own membership and adopt and from time to time modify rules governing the conduct of proceedings before it, and from time to time select the member of the said Board designated above as the chief medical officer of an institution for the feeble-minded or insane of the State of North Carolina. (1933, c. 224, s. 5; 1957, c. 1357, s. 16; 1959, c. 1019; 1963, c. 1166, s. 10.)

Editor's Note.—The 1957 amendment, effective January 1, 1958, substituted "State Health Director" for "secretary of the State Board of Health of North Carolina."

The 1959 amendment deleted the words "not located in Raleigh" formerly appearing at the end of subdivision (3) and at

the end of the section. It also substituted "State Hospitals Board of Control" for "State Hospital at Raleigh" at the end of subdivision (4).

Pursuant to Session Laws 1963, c. 1166, s. 10, "State Department of Mental Health" has been substituted for "State Hospitals Board of Control."

§ 35-44. Copy of petition served on patient.

- (d) If the said inmate, patient or individual resident be under twenty-one years of age and has a living parent or parents whose names and addresses are known or can by reasonable investigation be learned by said prosecutor, they or either of them, as the case may be, shall be served likewise with a copy of said petition and

notice and shall be entitled to at least twenty days' notice of the said hearing: Provided, that the procedure described in this section shall not be necessary in the case of any operation for sterilization or asexualization provided for in this article if the parent, legal or natural guardian, or spouse or next of kin of the inmate, patient or noninstitutional individual shall submit to the superintendent of the institution of which the subject is a patient or inmate, or to the director of public welfare of the county in which this subject is residing, regardless of whether the subject is a legal resident of such county, a duly witnessed petition requesting that sterilization or asexualization be performed upon said inmate, patient or noninstitutional individual, provided the other provisions of this article are complied with. Any operation authorized in accordance with this proviso may be performed immediately upon receipt of the authorization from the Eugenics Board. (1933, c. 224, s. 9; 1935, c. 463, ss. 3, 6; 1947, c. 93, 1961, c. 186.)

Editor's Note.—

The 1961 amendment substituted "director" for "superintendent" in line eleven

of subsection (d). As only this subsection was affected by the amendment the rest of the section is not set out.

ARTICLE 8.*Temporary Care and Restraint of Inebriates, Drug Addicts and Persons Insane.*

§§ 35-58 to 35-60: Repealed by Session Laws 1963, c. 1184, s. 36, effective July 1, 1963.

ARTICLE 9.*Mental Health Council*

§§ 35-61 to 35-63: Transferred to §§ 122-105 to 122-107 by Session Laws 1963, c. 1184, s. 13, effective July 1, 1963.

ARTICLE 10.*Interstate Compact on Mental Health.*

§§ 35-64 to 35-69: Transferred to §§ 122-99 to 122-104 by Session Laws 1963, c. 1184, s. 12, effective July 1, 1963.

ARTICLE 11.*Medical Advisory Council to State Board of Mental Health.*

§ 35-70. Creation of Council; membership; terms; vacancies.— There is hereby created an advisory council to be known as the "Medical Advisory Council to the State Board of Mental Health," composed of fifteen members to be appointed by the Governor for terms beginning July 1, 1963. For the initial terms of the members of the Council, five shall be appointed for terms of one (1) year each, five shall be appointed for terms of two (2) years each, and five shall be appointed for terms of three (3) years each. Upon the expiration of their respective terms, the successor of each member shall be appointed for a term of three (3) years each, and until his successor is appointed and qualified. Vacancies on the Council shall be filled by the Governor for unexpired terms. (1963, c. 668, s. 1.)

Editor's Note. — The act inserting this article became effective July 1, 1963.

§ 35-71. Per diem and allowances of members. — Members of the Council shall be paid, from funds appropriated to the State Board of Mental

Health, the same per diem, assistance and travel allowances as is now or may hereafter be prescribed for State boards and commissions generally. (1963, c. 668, s. 2.)

§ 35-72. Duties.—It shall be the duty of the Council to make periodic reviews and studies of the operation, maintenance and administration of the facilities and programs of the State Board of Mental Health and to make reports and recommendations from time to time to the State Board of Mental Health. (1963, c. 668, s. 3.)

ARTICLE 12.

Council on Mental Retardation.

§ 35-73. Creation of Council; membership; terms; chairman.—There is hereby created a Council on Mental Retardation to be appointed by the Governor and composed of the following members: Two persons who at the time of their appointment are members of the House of Representatives; two persons who at the time of their appointment are members of the Senate; a representative of the State Board of Health; a representative of the Department of Mental Health; a representative of the State Board of Public Welfare; a representative of the State Board of Education; a representative of the State Board of Correction and Training; a representative of the North Carolina Association for Retarded Children; and eight other persons who shall be selected without regard to employment or professional association. Of the members appointed from the General Assembly, the initial appointments of one member from the House of Representatives and of one member from the Senate shall be for a term of two (2) years. The remaining member from the House of Representatives and the remaining member from the Senate shall serve for a term of four (4) years. The member from the North Carolina Association of Retarded Children shall serve for a term of four (4) years. The members appointed from among the State boards and departments shall serve at the pleasure of the Governor. Of the remaining eight members, the initial appointments shall be as follows: Two members shall serve for a term of one (1) year; two members shall serve for a term of two (2) years; two members shall serve for a term of three (3) years; and two members shall serve for a term of four (4) years. Thereafter, the appointments of all members, with the exception of those from the State boards and departments, shall be for terms of four (4) years.

The Council on Mental Retardation shall choose its own chairman. (1963, c. 669, s. 1.)

Editor's Note. — The act inserting this article became effective July 1, 1963.

§ 35-74. Function of Council; meetings; annual report to Governor.—The function of the Council on Mental Retardation shall be to study ways and means of promoting public understanding of mental retardation problems in North Carolina; to consider the need for new State programs and laws in the field of mental retardation; and to make recommendations to and advise the Governor on matters relating to mental retardation. The Council shall meet at least four times a year and shall file an annual report with the Governor. (1963, c. 669, s. 2.)

§ 35-75. Per diem and allowances of members.—The members of the Council on Mental Retardation shall receive for their services the same per diem and allowances as are granted members of State boards and commissions generally. (1963, c. 669, s. 3.)

§ 35-76. Members of Council as State officials.—The members of the Council on Mental Retardation shall not be considered State officials within the

meaning of article XIV, § 7 of the North Carolina Constitution. (1963, c. 669, s. 4.)

§ 35-77. Payment of operating expenses.—All operating expenses of the Commission [Council] not provided for by legislative appropriation shall be paid from the Contingency and Emergency Fund upon application in the manner prescribed in G. S. 43-12. (1963, c. 669, s. 5.)

Chapter 36.

Trusts and Trustees.

Article 3.

Resignation of Trustee.

Sec.		Sec.	
36-17.	Court to appoint successor; when bond required.	of policy sufficient to support inter vivos trust.	
36-18.1.	Appointment of successors to deceased or incapacitated trustees.	36-54. Applicability and construction of article.	

Article 4.

Charitable Trusts.

36-19.	Trustees to file accounts; exceptions.
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Article 7.

Life Insurance Trusts.

36-53.	Interest of trustee as beneficiary
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Sec.

of policy sufficient to support inter vivos trust.

36-54. Applicability and construction of article.

Article 8.

Mutual Trust Investment Companies.

36-55.	Short title.
36-56.	Definition.
36-57.	Authority to incorporate.
36-58.	Application of general corporation law; articles of incorporation.
36-59.	Corporate requirements and restrictions.
36-60.	Purchase of stock by fiduciaries; authority and restrictions.
36-61.	Powers of Commissioner of Banks.

ARTICLE 1.

Investment and Deposit of Trust Funds.

§ 36-1. Certain investments deemed cash.—Guardians, executors, administrators, and others acting in a fiduciary capacity, having surplus funds of their wards, estates and cestuis que trustent to loan, may invest in United States bonds, or any securities for which the United States are responsible, farm loan bonds issued by federal land banks, bonds, debentures, consolidated bonds or other obligations of any federal home loan bank or banks, or in bonds of the State of North Carolina issued since the year one thousand eight hundred and seventy-two; or in drainage bonds duly issued under the provisions of article 8 of chapter entitled Drainage; and in settlements by guardians, executors, administrators, trustees, and others acting in a fiduciary capacity, such bonds or other securities of the United States, and such bonds of the State of North Carolina, and such drainage bonds, shall be deemed cash to the amount actually paid for same, including the premium, if any, paid for such bonds or other securities, and may be paid as such by the transfer thereof to the persons entitled.

Guardians, executors, administrators and others acting in a fiduciary capacity may invest surplus funds belonging to their wards in a savings account or accounts in any federally insured bank in North Carolina or in a certificate or certificates of deposit issued by any federally insured bank in North Carolina. (1870-1, c. 197; Code, s. 1594; 1885, c. 389; Rev., s. 1792; 1917, c. 6, s. 9; c. 67, s. 1; c. 152, s. 7; c. 191, s. 1; c. 269, s. 5; C. S., s. 4018; 1959, c. 364, s. 2; c. 1015, s. 2.)

Editor's Note.—The first 1959 amendment inserted, beginning in line five, the words "bonds, debentures, consolidated bonds or other obligations of any federal

home loan bank or banks." And the second 1959 amendment added the second paragraph.

§ 36-3 Investment in building and loan and federal savings and loan associations. Guardians, executors, administrators, clerks of the superior court and others acting in a fiduciary capacity may invest funds in their hands as such fiduciaries in stock of any building and loan association organized and licensed under the laws of this State: Provided, that no such funds may be so invested unless and until authorized by the Insurance Commissioner: Provided further, that such funds may be invested in stock of any federal savings and loan association organized under the laws of the United States, upon approval of an officer of the Home Loan Bank at Winston-Salem, or such other governmental agency as may hereafter have supervision of such associations: The authorization of the Commissioner of Insurance or an officer of the Home Loan Bank at Winston-Salem or other government agency having supervision will not be required to the extent that such funds are insured by the Federal Savings and Loan Insurance Corporation. (1933, c. 549, s. 1; 1937, c. 14, 1953, c. 620)

Editor's Note.—

The 1953 amendment, which added the last sentence, provided that "it does not

apply to funds already invested in the associations."

ARTICLE 3.

Resignation of Trustee.

§ 36-9. Clerk's power to accept resignations.

Special Proceeding to Resign.—A proceeding by a trustee for the purpose of resigning his trust is denominated a special proceeding Russ v. Woodward, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

Order Accepting Resignation Is Interlocutory Order.—The order of the clerk of the superior court accepting the resignation of a trustee in a special proceeding pursuant to this section is an interlocutory order regardless of whether an appeal is taken therefrom or not, since even in the absence of an appeal § 36-12 requires that such order be approved by the judge of the superior court before it becomes effective. Russ v. Woodward, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

The clerk has power to set aside his prior order accepting the resignation of a trustee and appointing a successor when

no appeal has been taken and the order has not been approved by the judge of the superior court Russ v. Woodward, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

Subsequent Valid Order Affirmed on Appeal.—Where the clerk of the court in the exercise of his valid discretionary power, has set aside his order accepting the resignation of a trustee, his subsequent valid order entered in proceedings consonant with statutory requirements and approved by the judge of the superior court in the exercise of judgment and discretion, will be affirmed on appeal Russ v. Woodward, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

Cited in Mast v. Blackburn, 248 N. C. 231, 102 S. E. (2d) 812 (1958); In re Covington's Will, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

verification.

testamentary when cause for removal exists. In re Covington's Will, 252 N. C. 551, 114 S. E. (2d) 261 (1960).

Stated in Russ v. Woodward, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

§ 36-10. Petition; contents and

Authority of Court to Revoke Letters Testamentary.—The fact that a fiduciary appointed by a court does not tender his resignation pursuant to this section does not deprive the court which appoints him of authority to act and to revoke the letters

§ 36-11. Parties; hearing; successor appointed.

Quoted in Russ v. Woodward, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

§ 36-12. Resignation allowed; costs; judge's approval.

Cross Reference. — See note under § 36-9.

"Approve" as used in this section implies the exercise of discretion and judgment. *Russ v. Woodard*, 232 N.C. 36, 59 S.E. (2d) 351 (1950).

Loss of Unrecorded Order.—A finding by the court that, upon due consideration of the evidence and the available records

in the office of the clerk, the order appointing a successor trustee had been approved by the court was sufficient to meet the requirements of this section though the order of approval had been lost without being recorded. *State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E. (2d) 806 (1956).

§ 36-13. Appeal; stay effected by appeal.

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E. (2d) 351 (1950).

§ 36-14. On appeal judge determines facts.

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E. (2d) 351 (1950).

§ 36-15. Final accounting before resignation.

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E. (2d) 351 (1950); *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

§ 36-16. Resignation effective on settlement with successor.

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E. (2d) 351 (1950).

§ 36-17. Court to appoint successor; when bond required.—If the court shall allow any executor, administrator, guardian, trustee, or other fiduciary to resign his trust upon compliance with the provisions of this article, it shall be the duty of the court to proceed to appoint some fit and suitable person as the successor of such executor, administrator, guardian, trustee or other fiduciary; and the court shall require the person so appointed to give bond with sufficient surety, approved by the court, in a sum double the value of the property to come into his hands when the bond is executed by a personal surety and in a sum one and one-fourth (1½) times the value of the property to come into his hands when the bond is executed by an indemnity or guaranty company authorized to do business in this State, conditioned upon the faithful performance of his duties as such fiduciary and for the payment to the persons entitled to receive the same of all moneys, assets, or other things of value which may come into his hands; provided, that where by the terms of the will or trust agreement the trustee who has resigned was not required to give bond and did not give bond and an intent therein is expressed by the testator or settlor that a successor trustee shall serve without bond, the clerk, with the approval of the judge, upon the petition of any party in interest, may waive the requirement of a bond for the successor trustee and permit said successor trustee to serve without bond. All bonds executed under the provisions of this article shall be filed with the clerk, and shall be recorded in his office in a book kept for that purpose. (1911, c. 39, s. 7; C.S., s. 4031; 1951, c. 264; 1965, c. 1177, s. 1.)

Editor's Note — Prior to the 1951 amendment, the bond in every case was to be in a sum double the value of the property coming into the fiduciary's hands.

The 1965 amendment added the proviso in the first sentence.

Laches in Objecting to Lack of Bond.—Failure of order appointing successor trustee to include provision for the giv-

ing of a bond could not be raised by beneficiaries of the trust 16 years after the order was entered. *State Trust Co. v. Toms*, 244 N.C. 645, 94 S.E. (2d) 806 (1956).

Stated in *Russ v. Woodard*, 232 N.C. 36, 59 S.E. (2d) 351 (1950); *Lichtenfels v. North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963).

§ 36-18. Rights and duties devolve on successor.

Applied in *Childers v. Parker's, Inc.*, 259 N. C. 237, 130 S. E. (2d) 323 (1963). Stated in *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

§ 36-18.1. Appointment of successors to deceased or incapacitated trustees.—Upon the death or incapacity of a trustee, a new trustee may be appointed on application by any beneficiary, or other interested persons, by petition to the clerk of the superior court of the county in which the instrument under which the deceased or incapacitated trustee claimed is registered, making all necessary parties defendants. The clerk shall docket the cause as a special proceeding and issue summons for the defendants, and the procedure shall be the same as in other special proceedings. If any of the defendants be nonresidents, summons may be served by publication; and if any be infants, a guardian ad litem must be appointed. The cestui que trust, creditor or any other person interested in the trust estate shall have the right to answer said petition or traverse the same and to offer evidence why the prayer of the petition should not be granted. After hearing the matter, the clerk may appoint the person so named in the petition, or he may appoint some other fit and suitable person or corporation to act as the successor of the deceased or incapacitated trustee; and the clerk shall require the person so appointed to give bond as required in G.S. 36-17; provided, that where by the terms of the instrument upon which the deceased or incapacitated trustee claimed, said trustee was not required to give bond and did not give bond and an intent therein is expressed by the testator or settlor that a successor trustee shall serve without bond, the requirement of a bond for the successor trustee may be waived as provided in G.S. 36-17. Any party in interest may appeal from the decision of the clerk as provided in G.S. 36-13 and 36-14. (1953, c. 1255; 1965, c. 1177, s. 2.)

Editor's Note. — The 1965 amendment added the proviso in the fifth sentence.

Appointment Prior to Effective Date of Section.—Prior to the enactment of this section a clerk of the superior court had no power to appoint successor trustees of a charitable trust, such authority being vested solely in the superior court under § 36-21 and not in the respective clerks thereof. *Mast v. Blackburn*, 248 N. C. 231, 102 S. E. (2d) 812 (1958).

The appointment by the clerk of suc-

cessor trustees of a charitable trust in ex parte proceeding prior to the effective date of this section is void, and such appointees may not maintain an action to restrain others from interfering with their asserted rights as trustees, but successor trustees may be appointed by the judge of the superior court nunc pro tunc under § 36-21 or by the clerk under this section. *Mast v. Blackburn*, 248 N. C. 231, 102 S. E. (2d) 812 (1958).

ARTICLE 4.

Charitable Trusts.

§ 36-19. Trustees to file accounts; exceptions.—When real or personal property has been granted by deed, will, or otherwise, for such charitable purposes as are allowed by law, it shall be the duty of those to whom are confided the management of the property and the execution of the trust, to deliver in writing a full and particular account thereof to the clerk of the superior court of the county where the charity is to take effect, on the first Monday in February in each year, to be filed among the records of the court, and spread upon the record of accounts.

This section shall not apply to real or personal property granted by deed, will or otherwise in trust or any other manner for the use and benefit of churches, hospitals, educational institutions and organizations or other incorporated or unincorporated religious and charitable institutions; provided, however, all trusts for the benefit of churches, hospitals and charitable institutions may be required to file such account upon the request of the clerk of the superior court or the verified written request of an interested citizen when in the opinion of the clerk

of the superior court such request is bona fide and the interest of the public would be promoted by the filing of such report. (43 Eliz., c. 4; 1832, c. 14, s. 1; R. C., c. 18, s. 1; Code, s. 2342; Rev., s. 3922; C. S., s. 4033; 1951, c. 1008, s. 1.)

Editor's Note. — The 1951 amendment added the second sentence.

§ 36-21. Not void for indefiniteness; title in trustee; vacancies.

Cross Reference. —

See note to § 36-18.1.

Cited in *Farnan v. First Union Nat'l Bank*, 263 N.C. 106, 139 S.E.2d 14 (1964).

§ 36-23.1. Gifts, etc., for religious, educational, charitable or benevolent uses or purposes.

Funds Turned Over to National Charity by County Chapter. — Where a county chapter of a national charity was required to turn over surplus funds to the national office, such funds were not impressed with a trust restricting use of the money to care of persons in the county, since the county chapter agreed to be governed by national regulations and the national organization did not mislead the county chapter into a

belief that a certain percentage of funds would be retained within the county. *National Foundation v. First Nat. Bank of Catawba County*, 288 F. (2d) 831 (1961).

Quoted in *Bennett v. Attorney General*, 245 N. C. 312, 96 S. E. (2d) 46 (1957).

Cited in *Farnan v. First Union Nat'l Bank*, 263 N.C. 106, 139 S.E.2d 14 (1964).

ARTICLE 5.

Uniform Trusts Act.

§ 36-27. Funds held by bank for investment or distribution. — Funds received or held by a bank as fiduciary awaiting investment or distribution shall be promptly invested, distributed or deposited to the credit of the trust department as a demand deposit in the commercial department of the bank or another bank or in savings accounts in the bank or another bank: Provided, that the bank or the commercial department shall first deliver to the trust department, as collateral security, securities eligible for the investment of the sinking funds of the State of North Carolina equal in market value to such deposited funds, or readily marketable commercial bonds having not less than a recognized "A" rating equal to one hundred and twenty-five per cent (125%) of the funds so deposited; and such collateral security shall be held by the trust department in trust and for the special benefit of the estate or fund for which the deposit was made, or, in case the deposit consists of uninvested or undistributed funds belonging to several estates or trust funds, then in trust for the special benefit of said estates or funds in proportion to their respective interest in such deposits. The said securities shall at all times be kept separate and apart from the other assets of the trust department and proper records shall be kept by the proper officer in connection therewith. If such funds are deposited in a bank insured under the provisions of the Federal Deposit Insurance Corporation, the above collateral security will be required only for that portion of uninvested balances of each trust which are not fully insured under the provisions of that corporation. (1939, c. 197, s. 4; 1963, c. 243, ss. 1, 2.)

Editor's Note. — The 1963 amendment inserted the words "or in savings accounts in the bank or another bank" immediately preceding the colon in the first sentence. It also deleted the former last sentence,

which read "Investment and/or invested shall not be construed to include savings accounts or certificates or deposits in any bank."

§ 36-28. Trustee buying from or selling to self.

Cited in *Miller v. First Nat. Bank*, 234 N. C. 309, 67 S. E. (2d) 362 (1951).

§ 36-39. Unenforceable oral trust created by deed.

Editor's Note.—For note on construction between persons in confidential relationship, see 31 N. C. Law Rev. 242.

§ 36-41. Power of beneficiary.

Applied in *Keesler v. North Carolina Nat. Bank*, 256 N. C. 12, 122 S. E. (2d) 807 (1961).

ARTICLE 7.*Life Insurance Trusts.*

§ 36-53. Interest of trustee as beneficiary of policy sufficient to support inter vivos trust.—The interest of a trustee as the beneficiary of a life insurance policy is a sufficient property interest or res to support the creation of an inter vivos trust notwithstanding the fact that the insured or any other person or persons reserves or has the right or power to exercise any one or more of the following rights or powers:

- (1) To change the beneficiary,
- (2) To surrender the policy and receive the cash surrender value,
- (3) To borrow from the insurance company issuing the said policy or elsewhere using the said policy as collateral security,
- (4) To assign the said policy, or
- (5) To exercise any other right in connection with the said policy commonly known as an incident of ownership thereof. (1957, c. 1444, s. 1.)

Editor's Note.—For comment on this section, see 36 N. C. Law Rev. 59.

§ 36-54. Applicability and construction of article.—Section 36-53 shall be applicable to all life insurance trusts whether created before or after the effective date of this article; provided, however that this article shall not apply to pending litigation. The enactment of this article shall not be construed as a legislative determination that the provisions of § 36-53 are different from the law in effect on the date of its enactment. (1957, c. 1444, s. 2.)

Editor's Note.—This article was enacted and became effective on June 12, 1957.

ARTICLE 8.*Mutual Trust Investment Companies.*

§ 36-55. Short title.—This article may be cited as the "Mutual Trust Investment Company Act." (1961, c. 964, s. 7.)

§ 36-56. Definition.—As used in this article, the term "mutual trust investment company" means a corporation which is:

- (1) An investment company as defined by an Act of Congress entitled "Investment Company Act of 1940" approved August 22, 1940, as amended.
- (2) Incorporated in compliance with the provisions of this article to constitute a medium for the common investment of trust funds held in a fiduciary capacity, either alone or with one or more co-fiduciaries, by state banks with trust powers, trust companies and national banks with trust powers which are located in this State. (1961, c. 964, s. 1.)

§ 36-57. Authority to incorporate.—Any five or more state banks with trust powers, trust companies and national banks with trust powers located in this State, are authorized, subject to the approval of the Commissioner of Banks and subject to such regulations as he may from time to time prescribe, to cause

a mutual trust investment company to be organized and incorporated. (1961, c. 964, s. 2.)

§ 36-58. Application of general corporation law; articles of incorporation.—Such a mutual trust investment company shall be incorporated under and be subject to the general corporation laws of this State except as herein otherwise provided. The incorporators subscribing and acknowledging the articles of incorporation shall consist of five or more persons who are officers or directors of the banks and trust companies causing such mutual trust investment company to be incorporated, and the articles of incorporation shall set forth, in addition to the facts specified in the general corporation laws, the name of each bank and trust company causing such corporation to be incorporated and the amount of stock subscribed for by each (1961, c. 964, s. 3.)

§ 36-59. Corporate requirements and restrictions.—(a) The stock of a mutual trust investment company shall be owned only by state banks with trust powers, trust companies and national banks with trust powers located in this State, acting as fiduciaries, and their individual co-fiduciaries, if any, but may be registered in the name of their nominee or nominees.

(b) A mutual trust investment company shall have not less than five directors. Such directors need not be stockholders but shall be officers or directors of banks or trust companies which are stockholders.

(c) A mutual trust investment company shall make no investment of its assets in:

(1) Shares of stock of any one corporation which would cause the total number of such shares held by the mutual trust investment company to exceed 10% of the number of such shares outstanding.

(2) Stock of any bank or trust company authorized to do business in North Carolina.

(d) A mutual trust investment company may acquire, purchase or redeem its own stock and may, by means of contract, or of its bylaws, bind itself to acquire, purchase or redeem its own stock, but it shall not vote shares of its own stock held by it in any manner.

(e) A mutual trust investment company shall not be responsible for ascertaining the investment powers of any fiduciary who may purchase its stock and shall not be liable for accepting funds from a fiduciary in violation of the restrictions of the will, trust indenture or other instrument under which such fiduciary is acting in the absence of actual knowledge of such violation, and shall be accountable only to the Commissioner of Banks and the fiduciaries who are the owners of its stock.

(f) Nothing in this article shall be construed or operate so as to relieve any fiduciary from his responsibility under the will, trust indenture or other instrument under which such fiduciary is acting or from any obligation, responsibility or liability imposed by law upon such fiduciary.

(g) Investment policy of a mutual trust investment company shall be fixed by its board of directors. The board of directors shall be responsible for the execution of policies fixed by it, but shall have the power to employ managers, officers and other personnel necessary for the orderly and efficient operation of the company. No investment shall be made except by vote of a majority of the directors at a meeting at which a majority of the directors are present and voting. (1961, c. 964, s. 4.)

§ 36-60. Purchase of stock by fiduciaries; authority and restrictions.—(a) State banks with trust powers, trust companies and national banks with trust powers located in this State, acting in a fiduciary capacity either alone or with one or more individual co-fiduciaries, may, if exercising the care of a prudent investor and with the consent of such individual co-fiduciary or co-fidu-

ciaries, if any, invest and reinvest funds held in such fiduciary capacity in the shares of stock of a mutual trust investment company complying with the requirements of this article except where the will, trust indenture or other instrument under which such fiduciary is acting prohibits such investment; provided, however, that no funds or property of any estate, trust or fund shall be invested in the stock of a mutual trust investment company in an amount which would result in such estate, trust or fund having a total investment therein in excess of the lesser of the following:

- (1) The maximum amount or percentage that might be invested by such estate, trust or fund, under regulations of the Federal Reserve Board in effect at the time of such investment, in a common trust fund having total assets equal to the total assets of the mutual trust investment company, as increased by the proposed investment.
- (2) Ten per cent of the assets of the mutual trust investment company as increased by the proposed investment.

(b) No funds of any estate, trust or fund shall be invested in the stock of a mutual trust investment company in an amount which would result in any bank or trust company having an aggregate holding in excess of twenty-five per cent of the total issued and outstanding stock of such mutual trust investment company as increased by the amount of the proposed investment. In the event that by reason of reduction of the holdings of stock by other banks or trust companies, mergers of banks or trust companies, or for other reasons the aggregate holding of stock in the mutual trust investment company by any bank or trust company shall become greater than twenty-five per cent of the total issued and outstanding stock, such bank or trust company may retain the stock then held by it but may not make further investments in such stock until its aggregate holdings have become less than such twenty-five per cent.

(c) A mutual trust investment company shall be permitted to rely on the written statement of any bank or trust company purchasing its stock, that the purchase complies with the foregoing requirements. (1961, c. 964, s. 5.)

§ 36-61. Powers of Commissioner of Banks.—(a) The Commissioner of Banks shall have authority to adopt and issue reasonable and uniform rules and regulations to govern the conduct and management of all mutual trust investment companies formed pursuant to this article and to prescribe, among other things:

- (1) The records and accounts to be kept by the mutual trust investment company.
- (2) The methods and standards to be employed in establishing the value of the shares of stock in the mutual trust investment company and of its assets.
- (3) The procedure to be followed in the sale and redemption of its stock.

(b) The Commissioner of Banks shall at least once in each calendar year, and whenever he deems it necessary or expedient, examine every such mutual trust investment company. On every such examination of a mutual trust investment company the Commissioner of Banks shall make inquiry as to its financial condition, the policies of its management, whether it is complying with the laws of this State and such other matters as the Commissioner of Banks may prescribe. The reasonable expenses of each examination of a mutual trust investment company pursuant to this section shall be borne and paid for by such company.

(c) In the enforcement of this article and the fulfillment of his responsibilities hereunder, the Commissioner of Banks shall have the same powers and authorities over and with respect to mutual trust investment companies and their directors, officers and employees, including the power to compel the attendance of witnesses and the production of books, records, documents and testimony, the power to require the submission to him of reports and information in such form

and at such times as he may prescribe, the power to direct the discontinuation of any practice which he may consider illegal, unauthorized or unsafe, and all other powers and authorities, whether or not specifically mentioned herein, as given the Commissioner of Banks by the laws of this State with respect to banks and trust companies, in the same manner and with like effect as if mutual trust investment companies were expressly named therein. (1961, c. 964, s. 6.)

Chapter 37.

Uniform Principal and Income Act.

§ 37-3. Income and principal; disposition.

Rent of realty is income. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

And such income is to be distributed to

the person entitled after payment of expenses properly chargeable to it. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 37-4. Apportionment of income.

Effect of Section.—This section makes the rule of § 42-6 applicable to the income from trusts. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

This section brings the administration of trusts in harmony with the apportionment principles of both §§ 42-6 and 42-7. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Rents Payable from Crop Proceeds on Sale Days Are "Periodic Payments."—Where the rents reserved were $\frac{1}{3}$ of the

sale price of the tobacco crops and were to be paid "at the warehouse" on the days the tenants sold tobacco, these sale days could not be designated in the lease; but they were no less "fixed periods" within the meaning of § 42-6, and "periodic payments" within the meaning of this section. Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Section Held Applicable to Rent Paid in Advance.—See Wells v. Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 37-5. Corporate dividends and share rights.—(a) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations, other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

(b) All rights to subscribe to the shares of other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights, shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights, shall be deemed income.

(c) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursements of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(d) Where a corporation succeeds another by merger, consolidation or reorgan-

ization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(e) Distributions made from ordinary income by a regulated investment company shall be deemed income. All distributions made by such a company from capital gains, whether in the form of cash or an option to take new stock or cash or an option to purchase additional shares, shall be deemed principal.

(f) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined, or in default thereof the date of declaration of the dividend. (1937, c. 190, s. 5; 1965, c. 629.)

Editor's Note.—The 1965 amendment inserted present subsection (e).

Chapter 1188, Session Laws 1965, makes c. 629, Session Laws 1965, which amended

this section, apply to trusts created and to wills of persons dying after the ratification of c. 629.

§ 37-12. Expenses; trust estates.

Cross Reference.—See note to § 37-4.

The trustee's expenses in raising a crop (labor and supplies) are properly chargeable against the income derived from the sale of the crop and are properly apportioned. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217

(1965).

Expenses will be apportioned in the same percentages as the apportionment of the rents. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Chapter 38.

Boundaries.

§ 38-1. Special proceeding to establish.

Strict Observance of Statutes Required.—As under prior statutes relating to processioning proceedings, a strict observance of statutory provisions in all material respects is required. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Purpose of Processioning.—

The sole purpose of a processioning proceeding is to establish the true location of disputed boundary lines. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Title to the land is not in issue, etc.—

In accord with original See *Neshitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E. (2d) 472 (1954).

Title or ownership is not directly put in issue in a processioning proceeding. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Consent of Both Owners, etc.—

A special proceeding under this chapter may be instituted by an owner of land whose boundary lines are in dispute. Prud-

den v. Keemer, 262 N.C. 212, 136 S.E.2d 604 (1964).

Dispute as to Boundary, etc.—

Only disputed boundary lines are the subject of processioning proceedings. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Where the petition in processioning proceedings does not allege what boundary is in dispute between petitioners and respondents, and, while containing a legal description of the lands claimed by petitioners, fails to locate any lines as claimed by petitioners on the earth's surface, the petition is fatally defective and insufficient to confer jurisdiction on the court. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Call in Deed Is Binding.—

Where petitioners in a processioning proceeding introduce evidence fixing the corner of a contiguous tract, and the next call in their description is by course and distance to a stone (a corner in dispute),

and the evidence is to the effect that the stone was small and had been moved, the disputed corner must, as a matter of law, be fixed at the distance called for from the established corner, with the result that petitioners' evidence is sufficient to support a finding of the corner as contended by them. *Allen v. Cates*, 262 N.C. 268, 136 S.E.2d 579 (1964).

Action of Trespass Converted into Processioning Proceeding.—Where, in an action in trespass, the parties stipulated that each had title to his respective tract, and that the only controversy was as to the true location of the dividing line between the tracts, the action was thereupon converted into a processioning proceeding. It is not thereafter subject to dismissal as in case of nonsuit. *Welborn v. Bate Lumber Co.*, 238 N.C. 238, 77 S.E. (2d) 612 (1953).

When Title Is Not in Dispute.—Where petitioners allege ownership of contiguous tracts by the respective parties, and a dispute between them as to the true dividing line, and respondents do not deny petitioners' allegation of ownership except with respect to lappages and infringements on lands owned by respondent, and join in the prayer that the dividing line be properly located, title is not in dispute. *Nesbitt v. Fairview Farms, Inc.*, 239 N.C. 481, 80 S.E. (2d) 472 (1954).

§ 38-3. Procedure.

True Location of Disputed Line Must Be Alleged.—Under general rules applicable to pleadings, and specifically under this section, a petitioner must allege the true location of a disputed boundary line. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

The portion of this section providing that petitioner allege "facts sufficient to constitute the location of such line as claimed by him," requires that petitioner allege facts as to the location of the (disputed) line as claimed by him with sufficient definiteness that its location on the earth's surface may be determined from petitioner's description thereof. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Parties May Agree to Have Case Heard in First Instance by Presiding Judge.—This section directs that a processioning proceeding be heard first by the clerk. But the direction is not jurisdictional. A stipulation by which the parties agree to bypass the clerk and have the case heard and determined in the first instance by the presiding judge will be upheld. *Strickland v.*

Only Question Is Location of True Dividing Line.—Ordinarily, in a special proceeding under this chapter, where it is admitted that the lands of petitioner and respondent adjoin, the only question presented is the location of the true dividing line. *Lane v. Lane*, 255 N.C. 444, 121 S.E. (2d) 893 (1961).

When Nonsuit Not Proper.—Where in a processioning proceeding it appears that the parties are owners of adjoining tracts and that a bona fide dispute exists between them as to the location of the dividing line, nonsuit is not proper. *Plemons v. Cutshall*, 230 N.C. 595, 55 S.E. (2d) 74 (1949).

Where, in a processioning proceeding, the title of the respective parties is not in dispute, and the only real controversy is as to the location of the dividing line between the lands of the parties, nonsuit is erroneously entered. *Brown v. Hodges*, 230 N.C. 746, 55 S.E. (2d) 498 (1949).

Applied in *Strickland v. Kornegay*, 240 N.C. 758, 83 S.E. (2d) 903 (1954); *Perkins v. Clarke*, 241 N.C. 24, 84 S.E. (2d) 251 (1954); *Twiford v. Harrison*, 260 N.C. 217, 132 S.E.2d 321 (1963).

Cited in *Newkirk v. Porter*, 237 N.C. 115, 74 S.E. (2d) 235 (1953); *Kanupp v. Land*, 248 N.C. 203, 102 S.E. (2d) 779 (1958).

Kornegay, 240 N.C. 758, 83 S.E. (2d) 903 (1954); *Andrews v. Andrews*, 252 N.C. 97, 113 S.E. (2d) 47 (1960).

Proceeding Assimilated to Action to Quiet Title.

Where, in a special proceeding under this chapter to establish a boundary line, the defendant by his answer denies the petitioner's title and as a defense pleads seven years' adverse possession under color of title under § 1-38, or twenty years' adverse possession under § 1-40, the proceeding is assimilated to an action to quiet title. In such case, as provided by § 1-399, the clerk "shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings." *Lane v. Lane*, 255 N.C. 444, 121 S.E. (2d) 893 (1961).

Effect of Erroneous Transfer of Cause.—The fact that the clerk in a processioning proceeding erroneously concludes that the answer converted the proceeding into an action to try title to realty, and thereupon transfers the cause to the civil issue docket for trial, does not deprive the superior court of jurisdiction to determine

the processioning proceeding. *Lance v. Cogdill*, 236 N. C. 134, 71 S. E. (2d) 918 (1952).

Burden of Proof.

In accord with 2nd paragraph in original. See *Jenkins v. Trantham*, 244 N. C. 422, 94 S. E. (2d) 311 (1956).

The burden of proof rests upon a petitioner to establish the true location of a disputed boundary line. *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

In a proceeding to establish disputed boundary lines petitioners may contend that the true boundary is shown by the line on surveyor's map marked by letters as alleged in their petition and also may contend that the true boundary is shown by the fence on the surveyor's map by reason of title having vested in them to the land in dispute up to the fence by adverse possession under § 1-40. They may assert both contentions leaving it to the court and jury to say which line, if either, they have carried the burden of establishing. *Jenkins v. Trantham*, 244 N. C. 422, 94 S. E. (2d) 311 (1956).

Questions of Law and Fact.—What is the true dividing line between two contiguous tracts of land is a question of law for the court; where such line is actually located on the premises is an issue of fact for the jury. *Lance v. Cogdill*, 236 N. C. 134, 71 S. E. (2d) 918 (1952); *Welborn v. Bate Lumber Co.*, 238 N. C. 238, 77 S. E. (2d) 612 (1953); *Andrews v. Andrews*, 252 N. C. 97, 113 S. E. (2d) 47 (1960). See *Jenkins v. Trantham*, 244 N. C. 422, 94 S. E. (2d) 311 (1956).

The provision of a judgment for mark-

ing the line as judicially determined, as provided by subsection (3) of this section, was a mere direction for the performance of a ministerial duty which in no way affected the finality of the determination of how the line should be run. *Harrill v. Taylor*, 247 N. C. 748, 102 S. E. (2d) 223 (1958).

The clerk's jurisdiction to enter a judgment by default in a processioning proceeding is based solely on the sentence in the portion of this section reading "If the defendants fail to answer, judgment shall be given establishing the line according to petition." *Pruden v. Keemer*, 262 N.C. 212, 136 S.E.2d 604 (1964).

Failure to Except to Judgment of Clerk and Take Appeal within Time Allowed.—Where there is a failure to except to judgment of the clerk in a processioning proceeding fixing the boundary line between the contiguous tracts, and a failure to take an appeal from such judgment within the time allowed by this section, without any showing of excusable neglect, a petition for certiorari to review the judgment of the clerk is properly denied. *Johnson v. Taylor*, 257 N. C. 740, 127 S. E. (2d) 533 (1962).

Where Judgment Affirmed on Appeal.—Where judgment in a processioning proceeding establishing the dividing line between the tracts of the respective parties is affirmed on appeal, the lower court may retain the cause thereafter only for the purpose of putting into effect the provisions of this section. *Nesbitt v. Fairview Farms, Inc.*, 239 N. C. 481, 80 S. E. (2d) 472 (1954).

§ 38-4. Surveys in disputed boundaries.

Clerk Has No Power to Make Allowance for Costs.—

In accord with original. See *Ipock v.*

Miller, 245 N. C. 585, 96 S. E. (2d) 729 (1957).

Chapter 39.

Conveyances.

Article 1.

Construction and Sufficiency.

Sec.

39-3. [Repealed.]

39-6.2. Creation of interest or estate in personal property.

39-6.3. Inter vivos and testamentary conveyances of future interests permitted.

Article 2.

Conveyances by Husband and Wife.

Sec.

39-7. Instruments affecting married person's title; joinder of spouse; exceptions.

39-7.1. Certain instruments affecting married woman's title not executed by husband validated.

Sec.	Sec.
39-12. Power of attorney of married person.	39-13.4. Conveyances by husband or wife under deed of separation.
39-13. Spouse need not join in purchase-money mortgage.	
39-13.2. Married persons under twenty-one made competent as to certain transactions; certain transactions validated.	
39-13.3. Conveyances between husband and wife.	

Article 7.**Uniform Vendor and Purchaser Risk Act.**

39-37. Short title.
39-38. Uniformity of interpretation.
39-39. Risk of loss.

ARTICLE 1.*Construction and Sufficiency.***§ 39-1. Fee presumed, though word ‘heirs’ omitted.****Editor’s Note.—**

As to use of fee simple form deed to convey other than a fee, see 39 N. C. Law Rev. 283.

Presumption Held Rebutted.—

This section does not apply where the granting clause of the deed in plain and explicit words shows that the intention of the grantor was to grant merely a life estate, and the habendum clause creates no estate contradictory or repugnant to that given in the granting clause. Griffin v. Springer, 244 N. C. 95, 92 S. E. (2d) 682 (1956).

Rejection of Repugnant Clause, etc.—

Where the granting clause in a deed purported to convey the fee and the habendum and warranties were in harmony therewith, a clause in the description referring to the property conveyed as a right of way 100 feet wide did not limit the conveyance to an easement, and the contention that a fee simple was conveyed was supported by this section. McCotter v. Barnes, 247 N. C. 480, 101 S. E. (2d) 330 (1958).

When the granting clause, the habendum, and the warranty in a deed are clear and unambiguous, and fully sufficient to pass immediately a fee simple estate to the grantee or grantees, a paragraph inserted

between the description and the habendum in which grantor seeks to reserve a life estate in himself or another, or to otherwise limit the estate conveyed, will be rejected as repugnant to the estate and interest therein conveyed. Lackey v. Hamlet City Board of Education, 258 N. C. 460, 128 S. E. (2d) 806 (1963).

Deed Held to Convey Fee Simple Determinable.—Where a reverter clause and the purposes for which the property was to be held as expressed in the habendum were not irreconcilable with or repugnant to the granting clause, a fee simple determinable was conveyed, it being apparent that the grantors intended to convey an estate of less dignity than a fee simple absolute. Lackey v. Hamlet City Board of Education, 258 N. C. 460, 128 S. E. (2d) 806 (1963).

Determining Whether Grant Is of Easement Appurtenant or in Gross.—The fact that the words “heirs and assigns” are not entered after the name of the grantee of an easement is not controlling in determining whether the easement granted is an easement appurtenant or in gross. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Applied in Swaim v. Swaim, 235 N. C. 277, 69 S. E. (2d) 534 (1952).

not to invalidate.

In accord with original. See Holloman v. Davis, 238 N. C. 386, 78 S. E. (2d) 143 (1953).

Stated in Brown v. Hurley, 243 N. C. 138, 90 S. E. (2d) 324 (1955).

Description Too Vague and Indefinite.—

§ 39-3: Repealed by Session Laws 1961, c. 52, effective Oct. 1, 1961.

§ 39-6. Revocation of deeds of future interests made to persons not in esse.**Trustor May Not Withdraw Vested Interest of One in Esse When Trust**

Created. — This section gives the trustor no right to withdraw a vested interest in

property held by one who was in esse when the trust was created, but only to withdraw a future contingent interest to some person or persons not in esse or not de-

terminable until the happening of a future event. *Washington v. Ellsworth*, 253 N. C. 25, 116 S. E. (2d) 167 (1960).

§ 39-6.2 Creation of interest or estate in personal property.—Any interest or estate in personal property which may be created by last will and testament may also be created by a written instrument of transfer (1953, c 198.)

Editor's Note.—This section overrules the decision in *Speight v. Speight*, 208 N. C. 132, 179 S. E. 461, which held that there can be no limitation over after a life estate in personal property.

For comment on this section, see 31 N. C. Law Rev 408

The restriction upon the right to create a remainder in personal property after a life estate by deed, or other written instrument, has been eliminated by this section. *Ridge v. Bright*, 244 N. C. 345, 93 S. E. (2d) 607 (1956).

§ 39-6.3. Inter vivos and testamentary conveyances of future interests permitted.—(a) The conveyance, by deed or will, of an existing future interest shall not be ineffective on the sole ground that the interest so conveyed is future or contingent. All future interests in real or personal property, including all reversions, executory interests, vested and contingent remainders, rights of entry both before and after breach of condition and possibilities of reverter may be conveyed by the owner thereof, by an otherwise legally effective conveyance, inter vivos or testamentary, subject, however, to all conditions and limitations to which such future interest is subject.

(b) The power to convey as provided in subsection (a), can be exercised by any form of conveyance, inter vivos or testamentary, which is otherwise legally effective in this State at the date of such conveyance to transfer a present estate of the same duration in the property.

(c) This section shall apply only to conveyances which become operative to transfer title on or after October 1, 1961. (1961, c. 435.)

Future Interests in Personal Property.—As to personal property permanent in nature the generally accepted rule is that the same future interests that are permissible in the field of real property law

are also permissible in the law of personal property. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N. C. 371, 128 S. E. (2d) 867 (1963).

ARTICLE 2.

Conveyances by Husband and Wife.

§ 39-7. Instruments affecting married person's title; joinder of spouse; exceptions.—(a) In order to waive the elective life estate of either husband or wife as provided for in G.S. 29-30, every conveyance or other instrument affecting the estate, right or title of any married person in lands, tenements or hereditaments must be executed by such husband or wife, and due proof or acknowledgment thereof must be made and certified as provided by law.

(b) A married person may bargain, sell lease, mortgage, transfer and convey any of his or her separate real estate without joinder or other waiver by his or her spouse if such spouse is incompetent and a guardian or trustee has been appointed as provided by the laws of North Carolina, and if the appropriate instrument is executed by the married person and the guardian or trustee of the incompetent spouse and is probated and registered in accordance with law, it shall convey all the estate and interest as therein intended of the married person in the land conveyed, free and exempt from the elective life estate as provided in G.S. 29-30 and all other interests of the incompetent spouse.

(c) Subsection (a) shall not be construed to require the spouse's joinder or other waiver of the elective life estate of such spouse as provided for in G.S. 29-30 where a different provision is made or provided for in the General Statutes

including, but not limited to, G.S. 39-13, G.S. 39-13.3, G.S. 39-13.4, G.S. 31A-1 (d), and G.S. 52-10. (C. C. P., s. 429, subsec. 6; 1868-9, c. 277, s. 15; Code, s. 1256; 1899, c. 235, s. 9; Rev., s. 952; C. S., s. 997; 1945, c. 73, s. 4; 1957, c. 598, s. 3; 1965, c. 855.)

I. GENERAL CONSIDERATION.

Editor's Note.—

The 1957 amendment added an exception as to the provisions of § 39-13.3.

The 1965 amendment rewrote this section.

For note on wife's conveyance of her realty by virtue of husband's power of attorney, see 31 N.C. Law Rev. 228.

Deed Executed Same Day That Absolute Divorce Decree Was Rendered.—

Where a decree of absolute divorce was rendered and a quitclaim deed from the wife to the husband was executed on the same day, and the requirements necessary to the validity of a deed from a married woman to her husband as prescribed by the statute then in effect were not observed, it was held that if the deed was

executed and delivered prior to the rendition of the divorce decree, it would be void, and if it was executed and delivered subsequent thereto, it would be valid. An instruction that if the deed were executed and delivered at approximately the same time as the rendition of the divorce decree as a simultaneous transaction, the deed would be valid, was error. *Noble v. Pittman*, 241 N.C. 601, 86 S.E. (2d) 89 (1955).

Compliance with the statutory requirement in effect at the time the deed was executed was necessary to its validity. Failure to comply with the requirements rendered the deed of a married woman to her husband absolutely void. *Noble v. Pittman*, 241 N.C. 601, 86 S.E. (2d) 89 (1955).

§ 39-7.1. Certain instruments affecting married woman's title not executed by husband validated.—No conveyance, power of attorney, or other instrument affecting the estate, right or title of any married woman in lands, tenements or hereditaments which was executed by such married woman after February 6, 1964 and before June 8, 1965, shall be invalid for the reason that the instrument was not also executed by the husband of such married woman. (1965, c. 857.)

§ 39-12. Power of attorney of married person.—Every competent married person of lawful age is authorized to execute, without the joinder of his or her spouse, instruments creating powers of attorney affecting the real and personal property of such married person naming either third parties or, subject to the provisions of G.S. 52-6, his or her spouse as attorney in fact. Such instruments may confer upon the attorney, and the attorney may exercise, any and all powers which lawfully can be conferred upon an attorney in fact, including, but not limited to, the authority to join in conveyances of real property for the purpose of waiving or quitclaiming any rights which may be acquired as a surviving spouse under the provisions of G.S. 29-30. (1798, c. 510; R. C., c. 37, s. 11; Code, s. 1257; Rev., s. 957; C. S., s. 1002; 1965, c. 856.)

Editor's Note. — The 1965 amendment rewrote this section.

§ 39-13. Spouse need not join in purchase-money mortgage.—The purchaser of real estate who does not pay the whole of the purchase money at the time when he or she takes a deed for title may make a mortgage or deed of trust for securing the payment of such purchase money, or such part thereof as may remain unpaid, which shall be good and effectual against his or her spouse as well as the purchaser, without requiring the spouse to join in the execution of such mortgage or deed of trust. (1868-9, c. 204; Code, s. 1272; Rev., s. 958; 1907, c. 12; C. S., s. 1003; 1965, c. 852.)

Editor's Note. — The 1965 amendment added "or she" near the beginning of the section, substituted "his or her spouse as well as the purchaser" for "his wife as

well as himself" and substituted "the spouse" for "her" near the end of the section.

§ 39-13.2. Married persons under twenty-one made competent as to certain transactions; certain transactions validated.—(a) Any married person under twenty-one years of age is authorized and empowered and shall have the same privileges as are conferred upon married persons twenty-one years of age or older to:

- (1) Waive, release or renounce by deed or other written instrument any right or interest which he or she may have in the real or personal property (tangible or intangible) of the other spouse; or
- (2) Jointly execute with his or her spouse, if such spouse is twenty-one years of age or older, any note, contract of insurance, deed, deed of trust, mortgage, lien of whatever nature or other instrument with respect to real or personal property (tangible or intangible) held with such other spouse either as tenants by the entirety, joint tenants, tenants in common, or in any other manner.

(b) Any transaction between a husband and wife pursuant to this section shall be subject to the provisions of G.S. 52-6 whenever applicable.

(c) No renunciation of dower or courtesy or of rights under G.S. 29-30 (a) by a married person under the age of twenty-one years after June 30, 1960 and until April 7, 1961, shall be invalid because such person was under such age. No written assent by a husband under the age of twenty-one years to a conveyance of the real property of his wife after June 30, 1960 and until April 7, 1961, shall be invalid because such husband was under such age. (1951, c. 934, s. 1; 1955, c. 376; 1961, c. 184; 1965, c. 851; c. 878, s. 2.)

Editor's Note.—The 1955 amendment rewrote this section.

The 1961 amendment rewrote this section which formerly applied only to married women.

The first 1965 amendment deleted "now" preceding "conferred" in the introductory paragraph of subsection (a), deleted former subdivision (2) and redesignated sub-

division (3) of that subsection as subdivision (2).

The second 1965 amendment substituted "G.S. 52-6" for "G.S. 52-12" in subsection (b).

For brief comment on this section, see 29 N. C. Law Rev. 379. For article on tenancy by the entirety in North Carolina, see 41 N. C. Law Rev. 67.

§ 39-13.3. Conveyances between husband and wife.—(a) A conveyance from a husband or wife to the other spouse of real property or any interest therein owned by the grantor alone vests such property or interest in the grantee.

(b) A conveyance of real property, or any interest therein, by a husband or a wife to such husband and wife vests the same in the husband and wife as tenants by the entirety unless a contrary intention is expressed in the conveyance.

(c) A conveyance from a husband or a wife to the other spouse of real property, or any interest therein, held by such husband and wife as tenants by the entirety dissolves such tenancy in the property or interest conveyed and vests such property or interest formerly held by the entirety in the grantee.

(d) The joinder of the spouse of the grantor in any conveyance made by a husband or a wife pursuant to the foregoing provisions of this section is not necessary.

(e) Any conveyance by a wife authorized by this section is subject to the provisions of G.S. 52-6. (1957, c. 598, s. 1; 1965, c. 878, s. 3.)

Editor's Note.—The 1965 amendment substituted "G.S. 52-6" for "G.S. 52-12" in subsection (e).

For article on tenancy by the entirety in North Carolina including brief discussion of this section, see 41 N. C. Law Rev. 67.

§ 39-13.4. Conveyances by husband or wife under deed of separation.—Any conveyance of real property, or any interest therein, by the husband or wife who have previously executed a valid and lawful deed of separation which authorizes said husband or wife to convey real property or any interest therein without the consent and joinder of the other and which deed of separation is recorded in the county where the land lies, shall be valid to pass such

title as the husband or wife may have to his or her grantee, unless the deed of separation so recorded and registered in the register of deeds' office is cancelled of record by both parties and duly witnessed by the register of deeds or a deputy or assistant register of deeds of said county, or unless an instrument in writing cancelling the deed of separation and properly executed and acknowledged by said husband and wife is recorded in the office of said register of deeds. (1959. c. 512.)

ARTICLE 3.

Fraudulent Conveyances.

§ 39-15. Conveyance with intent to defraud creditors void.

I. GENERAL CONSIDERATION. II. WHAT CONVEYANCES FRAUDULENT.

It Applies Only to Conveyances Made by Debtor.—

In accord with original. See United States v. Haddock, 144 F. Supp. 720 (1956).

Applied in Purvis v. Whitaker, 238 N. C. 262, 77 S. E. (2d) 682 (1953).

Cited in New Amsterdam Cas. Co. v. Waller, 196 F. Supp. 780 (1961); New Amsterdam Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

§ 39-17. Voluntary conveyance creditors.

Transfer Is Evidence of Intent to Defraud.—This section provides that the transfer itself is evidence of an intention to defraud the creditor. New Amsterdam

A. In General.

Effect of Consideration.—

If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee, or of which he has notice, it is void. Orta v. Schafer, 284 F. (2d) 114 (1960), quoting Aman v. Walker, 165 N. C. 224, 81 S. E. 162 (1914).

evidence of fraud as to existing

Cas. Co. v. Waller, 301 F. (2d) 839 (1962).

Cited in New Amsterdam Cas. Co. v. Waller, 196 F. Supp. 780, (1961).

§ 39-23. Sales in bulk presumed fraudulent.—The sale in bulk of a large part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller, unless the seller, at least seven days before the sale, makes an inventory showing the quantity and, so far as possible, the cost price to the seller of such articles included in the sale, and shall seven days before the proposed sale notify the creditors of the proposed sale, and the price, terms and conditions thereof. Such sale, even though the above requirements as to inventory and notice are fully complied with, renders the transaction *prima facie* fraudulent, and open to attack on such ground by creditors of the seller. If the owner of said stock of goods shall at any time before the sale execute a good and sufficient bond, to a trustee therein named, in an amount equal to the actual cash value of the stock of goods, and conditioned that the seller will apply the proceeds of the sale, subject to the right of the owner or owners to retain therefrom the personal property exemption or exemptions as are allowed by law, as far as they will go in payment of debts actually owing by the owner or owners, or if in fact the proceeds are so applied, then the provisions of this section shall not apply. Such sale of merchandise in bulk shall not be presumed to be a fraud as against any creditor or creditors who shall not present his or their claim or make demand upon the purchaser in good faith of such stock of goods and merchandise, or to the trustee named in any bond given as provided herein, within twelve months from the date of maturity of his claim, and any creditor who does not present his claim or make demand either upon the purchaser in good faith or on the trustee named in a bond within twelve months from the date of its maturity shall be barred from recovering on his claim on such bond, or as against the purchaser, in good faith, of such stock of goods

in bulk. Nothing in this section shall prevent voluntary assignments or deeds of trust for the benefit of creditors as now allowed by law, or apply to sales by executors, administrators, receivers or assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any public officers under judicial process. (1907, c. 623; 1913, c. 30, s. 1; Ex. Sess. 1913, c. 66, s. 1; C. S., s. 1013; 1933, c. 190; 1945, c. 635; 1963, c. 1179.)

Cross References.—

For provisions of the Uniform Commercial Code as to bulk transfers, see §§ 25-6-101 to 25-6-111.

Editor's Note.—

The 1963 amendment inserted the words "or if in fact the proceeds are so applied" near the end of the third sentence.

Section 2, c. 700, Session Laws 1965 repeals this section, effective at midnight June 30, 1967.

It is appropriate to bear in mind that the decisions under this section in the original volume were written in the light of the wording of the statute at the time. Kramer Bros., Inc. v. McPherson, 245 N.C. 354, 95 S.E. (2d) 889 (1957), discussing the amendments

History.—For a history of this section, see Kramer Bros., Inc. v. McPherson, 245 N.C. 354, 95 S.E. (2d) 889 (1957).

Merchandise Defined.—

See Kramer Bros., Inc. v. McPherson, 245 N.C. 354, 95 S.E. (2d) 889 (1957).

This section does not apply to seller's repossession of chattels under conditional sales contracts, even though the chattels constitute the bulk of the purchaser's stock of merchandise, since the debts secured by

the instruments are not pre-existent but contemporaneous with the conditional sales. McCreary Tire & Rubber Co. v. Crawford, 253 N.C. 100, 116 S.E. (2d) 491 (1960).

Remedies of Creditors.—When a sale of merchandise in bulk is avoided for non-compliance with the statute, the goods can be made available by direct process or levy and sale in the hands of the original purchaser, or such purchaser may be held liable for their value when they are disposed of by him, and either remedy is available to the creditors of the vendor against subsequent purchasers as long as the goods can be identified, or until they have passed into the hands of a bona fide purchaser for value without notice. Raleigh Tire & Rubber Co. v. Morris, 181 N.C. 184, 106 S.E. 562 (1921), cited in Kramer Bros., Inc. v. McPherson, 245 N.C. 354, 95 S.E. (2d) 889 (1957).

When Compliance Is Question for Jury.—

Evidence held to make out a case for the jury for violation of this section. Kramer Bros., Inc. v. McPherson, 245 N.C. 354, 95 S.E. (2d) 889 (1957).

ARTICLE 4.

Voluntary Organizations and Associations.

§ 39-24. Authority to acquire and hold real estate.—Voluntary organizations and associations of individuals organized for charitable, fraternal, religious, social or patriotic purposes, when organized for the purposes which are not prohibited by law, are hereby authorized and empowered to acquire real estate and to hold the same in their common or corporate names and may sue and be sued in their common or corporate names concerning real estate so held: Provided, that voluntary organizations and associations of individuals, within the meaning of this article, shall not include associations, partnerships or copartnerships which are organized to engage in any business, trade, or profession. (1939, c. 133, s. 1; 1951, c. 86; 1965, c. 809.)

Editor's Note. — The 1951 amendment inserted the words: "and may sue and be sued in their common or corporate names concerning real estate so held."

The 1965 amendment inserted "social" preceding "or patriotic" near the beginning of this section.

Right to Sue in Common Name.—Even prior to the 1951 amendment it was held

that, since an unincorporated fraternal association is given power to acquire and hold property in its common name by virtue of this and the following sections and may be served with summons and sued in the manner provided by § 1-97(6) it has capacity to sue in its common name Ionic Lodge v. Ionic etc., Co., 232 N.C. 252, 59 S.E. (2d) 829 (1950).

Quoted in *Venus Lodge v Acme Beneficent Ass'n*, 23 N.C. 522, 58 S.E. (2d) 109, 15 A.L.R. (2d) 1446 (1950).

Cited in *Ionic Lodge v Ionic, etc., Co.*, 232 N.C. 648, 62 S.E. (2d) 73 (1950).

§ 39-25. Title vested; conveyance; probate.

Cross Reference. — See note under § 39-24.

Cited in *Ionic Lodge v Ionic, etc., Co.*, 232 N.C. 252, 59 S.E. (2d) 829 (1950).

§ 39-27. Prior deeds validated.

Cited in *Ionic Lodge v Ionic, etc., Co.*, 232 N.C. 252, 59 S.E. (2d) 829 (1950).

ARTICLE 5A.

Control Corners in Real Estate Developments.

§ 39-32.1. Requirement of permanent markers as "control corners." — Whenever any person, firm or corporation shall hereafter divide any parcel of real estate into lots and lay off streets through such real estate development and sell or offer for sale any lot or lots in such real estate development, it shall be the duty of such person, firm or corporation to cause one or more corners of such development to be designated as "control corner" and shall cause two or more street center lines or offset lines within or on the street right of way lines to be permanently monumented at intersecting center lines or offset lines, points of curvature or such other control points, which monuments shall also be designated as control corners and to affix or place at such control corner or corners permanent markers which shall be of such material and affixed to the earth in such a manner as to insure as great a degree of permanence as is reasonably practical. (1947, c. 816, s. 1; 1959, c. 1159.)

Editor's Note. — The 1959 amendment inserted beginning after "control corner" in line five the provision as to street center lines or offset lines. The amend-

tory act provided that it should not apply to Franklin, Tyrrell and Washington counties.

ARTICLE 6.

Power of Appointment.

§ 39-33. Method of release or limitation of power.

No Release or Estoppel Where Persons Adversely Affected Do Not Join in or Receive Deeds. — Where none of the deeds executed by the donee of a power is joined in by or executed to any person

who would be adversely affected by the exercise of the power, there is no release or estoppel. *Weston v. Hasty*, 264 N.C. 432, 142 S.E.2d 23 (1965).

§ 39-34. Method prescribed in § 39-33 not exclusive.

Method Not Exclusive. — The release of a power of appointment exercisable by deed or will is not limited to the manner

provided in § 39-33. *Weston v. Hasty*, 264 N.C. 432, 142 S.E.2d 23 (1965).

ARTICLE 7.

Uniform Vendor and Purchaser Risk Act.

§ 39-37. Short title. — This article may be cited as the Uniform Vendor and Purchaser Risk Act. (1959, c. 514.)

§ 39-38. Uniformity of interpretation. — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1959, c. 514.)

§ 39-39. Risk of loss.—Any contract hereafter made in this State for the purchase and sale of realty shall be interpreted as including an agreement that the parties shall have the following rights and duties, unless the contract expressly provides otherwise:

- (1) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part thereof is destroyed without fault of the purchaser, the vendor cannot enforce the contract, and the purchaser is entitled to recover any portion of the price that he has paid;
- (2) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part thereof is destroyed without fault of the vendor, the purchaser is not thereby relieved from a duty to pay the price, nor is he entitled to recover any portion thereof that he has paid. (1959, c. 514.)

Chapter 40.

Eminent Domain.

Article 3.

Sec.

Public Works Eminent Domain Law.		immediate hearing, entry upon land by petitioner.
Sec.		

40-33. Institution of proceedings; venue; 40-34. Filing and form of petition.

ARTICLE 1.

Right of Eminent Domain.

§ 40-1. Corporation in this chapter defined.

Cross Reference.—As to condemnation proceedings by the State Highway Commission, see §§ 136-103 to 136-121.

Editor's Note.—For article on eminent domain in North Carolina, see 35 N. C. Law Rev. 296.

Applied in Northgate Shopping Center, Inc. v. State Highway Comm'n, 265 N.C. 209, 143 S.E.2d 244 (1965).

Cited in North Asheboro-Central Falls Sanitary Dist., 252 N. C. 749, 114 S. E. (2d) 577 (1960).

§ 40-2. By whom right may be exercised.—The right of eminent domain may, under the provisions of this chapter, be exercised for the purpose of constructing their roads, canals, pipe lines originating in North Carolina for the transportation of petroleum products or coal, pipe lines and mains originating in North Carolina for the transportation, distribution, or both, of gas, lines of wires, or other works, which are authorized by law and which involve a public use or benefit, by the bodies politic, corporation, or persons following:

1. Railroads, street railroads, plankroad, tramroad, turnpike, canal, pipe lines originating in North Carolina for the transportation of petroleum products or coal, pipe lines and mains originating in North Carolina for the transportation, distribution, or both, of gas, limestone, minerals, telegraph, telephone, electric power or lighting, public water supply, flume, or incorporated bridge companies.

10. Public sewerage systems which have been granted a certificate of public convenience and necessity by the North Carolina Utilities Commission. (1852, c. 92, s. 1; R. C., c. 61, s. 9; 1874-5, c. 83; Code, s. 1698; Rev., s. 2575; 1907, cc. 39, 458, 783; 1911, c. 62, ss. 25, 26, 27; 1917, cc. 51, 132; C. S., s. 1706; 1923, c. 205; Ex. Sess. 1924, c. 118; 1937, c. 108, s. 1; 1939, c. 228, s. 4; 1941, c. 254; 1947, c. 806; 1951, c. 1002, ss. 1, 2; 1953, c. 1211; 1957, c. 1045, s. 1; 1961, c. 247.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1951 amendment inserted the words "pipe lines and mains originating in North Carolina for the transportation, distribution, or both, of gas" in the preliminary paragraph and in subsection 1. The 1953 amendment inserted the words "limestone, minerals" in subsection 1. The 1957 amendment inserted the words "or coal" in the preliminary paragraph and in subsection 1.

The 1961 amendment added subsection 10. As the rest of the section was not affected by the amendments it is not set out.

For comment on possibility of statute imposing a limitation on § 136-19, see 28 N. C. Law Rev. 403.

The words "eminent domain" mean the power of the sovereign or some agency authorized by it to take private property for public use. Virginia Electric & Power Co. v. King, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

Power of Eminent Domain Is Attribute of Sovereignty. — The power of eminent domain is one of the attributes of a sovereign state. Redevelopment Comm. of Greensboro v. Hagins, 258 N. C. 220, 128 S. E. (2d) 391 (1962).

And Exists Independently of Constitutional Provisions. — The right to take private property for public use exists independently of constitutional provisions. In fact, such provisions are limitations on the State's power to exercise the right. Redevelopment Comm. of Greensboro v. Hagins, 258 N. C. 220, 128 S. E. (2d) 391 (1962).

Power of Condemnation Is Dependent upon Statute. —

The right to exercise the power of eminent domain belongs to every independent government exercising sovereign power as a necessary incident to its sovereignty. And this power, unless otherwise provided in the organic law, rests solely in the State unless by legislative action the power is delegated and the purposes for which it may be exercised enumerated and the procedure for such exercise prescribed. Mount Olive v. Cowan, 235 N. C. 259, 69 S. E. (2d) 525 (1952).

A municipal corporation, being a creature of the legislature, can only exercise the right of eminent domain when authorized to do so by its charter or by the general law. Mount Olive v. Cowan, 235 N. C. 259, 69 S. E. (2d) 525 (1952).

Condemnation proceedings for a school site must be considered as instituted un-

der the provisions of this section pursuant to authority conferred by § 115-125. Toppling v. State Board of Education, 249 N. C. 291, 106 S. E. (2d) 502 (1959).

A municipality, at the present time, cannot condemn land for street purposes under the substantive power granted in this article. Mount Olive v. Cowan, 235 N. C. 259, 69 S. E. (2d) 525 (1952).

Cited in Raleigh v. Edwards, 235 N. C. 671, 71 S. E. (2d) 396 (1952); North Carolina State Highway Comm'n v. York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

II. NATURE AND PURPOSE.

Diversion of Water. — Diversion of the natural flow and drainage of streams and surface waters incident to the construction of a highway, resulting in the periodic flooding of the lands of a proprietor, is a "taking" of property for which just compensation must be paid. Braswell v. State Highway & Public Works Comm., 250 N. C. 508, 108 S. E. (2d) 912 (1959).

Additional Rights to Serve Public. — If the property owned by a corporation having the right of eminent domain is inadequate for its corporate purposes, it may purchase such additional rights as it may need to serve the public. Such purchase may be with the consent of the owner or by condemnation—a purchase without the owner's consent at the value of the property taken. Virginia Electric & Power Co. v. King, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

IV. TO WHOM GRANTED.

Railroads are quasi-public corporations, created to serve primarily the public good and convenience. As such they exercise public franchise rights, including that of eminent domain. Seaboard Air Line R. Co. v. Atlantic Coast Line R. Co., 240 N. C. 495, 82 S. E. (2d) 771 (1954).

V. COMPENSATION ESSENTIAL.

Necessity for Compensation.—

The right to exercise the power of eminent domain is always subject to the principle that there must be definite and adequate provision made for reasonable compensation to the owner of the property proposed to be taken. Mount Olive v. Cowan, 235 N. C. 259, 69 S. E. (2d) 525 (1952).

When the right is exercised, a duty is imposed on condemnor to pay just compensation for the property taken. Virginia Electric & Power Co. v. King, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

§ 40-3. Right to enter on and purchase lands.

Acts Not Constituting a Taking.—The mere threat to take a right of way under the power of eminent domain and an isolated act in going upon the land in making

a preliminary survey, are insufficient to constitute a "taking." *Penn v Carolina-Virginia Coastal Corp.*, 231 N. C. 481, 57 S. E. (2d) 817 (1950).

§ 40-8. May take material from adjacent lands.

Right to Cut Trees Cannot Be Taken without Compensation.—Where the right to cut trees has not been acquired when the right of way is condemned, and has not been paid for in the first proceeding, the right could not in a subsequent proceeding be taken without compensation. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N. C. 717, 127 S. E. (2d) 539 (1962).

Light Co., 257 N. C. 717, 127 S. E. (2d) 539 (1962).

Compensation for the right to cut trees should be made in a lump sum under the established rule for measuring damages in condemnation proceedings. *Weyerhaeuser Co. v. Carolina Power & Light Co.*, 257 N. C. 717, 127 S. E. (2d) 539 (1962).

§ 40-10. Dwelling houses and burial grounds cannot be condemned.

Local Modification. — City of Greensboro: 1951, c. 707 s 3.

History of Section.—See *Mount Olive v. Cowan*, 235 N. C. 259, 69 S. E. (2d) 525 (1952).

The limitation in this section is only upon such corporations as are defined and named in the preceding sections of the article, when exercising the power of eminent domain granted in the article, or the amendments thereto, in connection with the construction of the works or projects enumerated therein, and pursuant to the authority granted thereby. *Mount Olive v. Cowan*, 235 N. C. 259, 69 S. E.

(2d) 525 (1952).

And Is Not Applicable to Power Granted Municipalities by §§ 160-204, 160-205.—See *Mount Olive v. Cowan*, 235 N. C. 259, 69 S. E. (2d) 525 (1952); *Raleigh v. Edwards*, 235 N. C. 671, 71 S. E. (2d) 396 (1952), commented on in 31 N. C. Law Rev. 125 And see note to § 160-204.

Section Not Applicable to Proceeding to Condemn Lands for Housing Project.—See *In re Housing Authority*, 233 N. C. 649, 65 S. E. (2d) 761 (1951).

Cited in Proctor v State Highway, etc., Comm., 230 N. C. 687, 55 S. E. (2d) 479 (1949).

ARTICLE 2.**Condemnation Proceedings.**

§ 40-11. Proceedings when parties cannot agree.—If any corporation, enumerated in § 40-2, possessing by law the right of eminent domain in this State, is unable to agree for the purchase of any real estate required for purposes of its incorporation or for the purposes specified in this chapter, it shall have the right to acquire fee simple title to such real estate or an easement in such real estate in the manner and by the special proceedings herein prescribed. (1871-2, c. 138, s 13; Code, ss 1943, 2009; 1885, c. 168, 1893, c. 63, 1899, c. 64, 1901, cc. 6, 41, s. 2; 1903, c. 159, s. 16; c. 562; Rev., s. 2579; C. S., s. 1715; 1951, c. 59, s 1.)

Editor's Note. — Prior to the 1951 amendment the part of the section following "acquire" in line five read: "title to the same in the manner and by the special proceedings herein prescribed"

the requirements of this section. *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

Prior Attempt to Agree Mandatory.—

Before the agency seeking to acquire can ask the court to condemn, it must make a bona fide effort to purchase by private negotiation. *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

Proceedings Instituted Only When Parties Cannot Agree.—It is only when the parties cannot agree that condemnation proceedings may be instituted. *Weverhaeuser Co. v. Carolina Power & Light*

One cannot condemn that which he owns. To hold otherwise would ignore

Co., 257 N. C. 717, 127 S. E. (2d) 539 (1962).

If owner and State Highway and Public Works Commission are unable to agree as to the amount of compensation for taking of property under eminent domain, either party may institute proceedings to have the matter determined. Proctor v. State Highway, etc., Comm., 230 N. C. 687, 55 S. E. (2d) 479 (1949); Jacobs v. State Highway Comm., 254 N. C. 200, 118 S. E. (2d) 416 (1961).

Proceeding Is in Rem.—Condemnation under the power of eminent domain is a proceeding in rem—against the property. Redevelopment Comm. of Greensboro v. Hagins, 258 N. C. 220, 128 S. E. (2d) 391 (1962).

The procedure outlined in this article must be followed in condemning property for the purposes enumerated in § 160-204. Mount Olive v. Cowan, 235 N. C. 259, 69 S. E. (2d) 525 (1952).

Joining Owners of Several Tracts in One Proceeding.—Where it is sought to condemn several tracts of land belonging to different owners, all the owners may be joined in one proceeding, in the absence of any statutory provision to the contrary. Such a course is convenient, and can injure no one if damages are separately assessed to each owner. Redevelopment Comm. of Greensboro v. Hagins, 258 N. C. 220, 128 S. E. (2d) 391 (1962).

Defenses.—Each owner is entitled to defend upon the ground his property does not qualify for the purpose intended, or that its selection was the result of arbitrary or capricious conduct on the part of the taking agency. Redevelopment Comm. of Greensboro v. Hagins, 258 N. C. 220, 128 S. E. (2d) 391 (1962).

§ 40-12. Petition filed; contains

Editor's Note.—A number of the State highway cases cited below were decided under this section and § 136-19 as the latter stood prior to the first 1959 amendment, when the power to condemn was exercised pursuant to the provisions of this section rather than the provisions of article 9 of chapter 136.

When Sections Applicable.—This and the following sections with provisions for commissioners, appraisal, viewing the premises, etc., are applicable only to instances where the condemnor acquires title and right to possession of specific land. Eller v. Board of Education, 242 N. C. 584, 89 S. E. (2d) 144 (1955).

Remedy When Land Taken for Highway Purposes.—When the State Highway

Noncompensable Losses.—Where an entire leasehold estate is taken in the exercise of the power of eminent domain, the lessee is not entitled to recover compensation for the incidental loss attributable to the costs of removing his stock of merchandise, fixtures and other personal property, the interruption or loss of business, or loss of customers or good will, incident to the necessity of moving to a new location, since such losses are not property and are non-compensable. Williams v. State Highway Comm., 252 N. C. 141, 113 S. E. (2d) 263 (1960); Zourzoukis v. State Highway Comm., 252 N. C. 149, 113 S. E. (2d) 269 (1960).

Applied in State Highway Comm. v. Privett, 246 N. C. 501, 99 S. E. (2d) 61 (1957); Housing Authority of City of Wilson v. Wooten, 257 N. C. 358, 126 S. E. (2d) 101 (1962); Kirkman v. State Highway Comm., 257 N. C. 428, 126 S. E. (2d) 107 (1962); City of Charlotte v. Spratt, 263 N.C. 656, 140 S.E.2d 341 (1965); Duke Power Co. v. Black, 263 N.C. 811, 140 S.E.2d 540 (1965).

Quoted in Penn v. Carolina Virginia Coastal Corp., 231 N. C. 481, 57 S. E. (2d) 817 (1950).

Stated in Guilford Realty & Ins. Co. v. Blythe Bros. Co., 260 N. C. 69, 131 S. E. (2d) 900 (1963).

Cited in Collins v. State Highway, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953); Eller v. Board of Education, 242 N. C. 584, 89 S. E. (2d) 144 (1955); Martin v. United States, 240 F. (2d) 326 (1957); North Carolina State Highway Comm'n v. York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

what; copy served.

Commission, in the exercise of the power of eminent domain conferred upon it by § 136-19, takes land or any interest therein for highway purposes, the owner's remedy is by special proceeding as provided by this article. Cannon v. Wilmington, 242 N. C. 711, 89 S. E. (2d) 595 (1955); Jacobs v. State Highway Comm., 254 N. C. 200, 118 S. E. (2d) 416 (1961).

Section 136-19 was amended in 1959 to provide that condemnation proceedings by the State Highway Commission shall be conducted pursuant to §§ 136-103 to 136-121 enacted in 1959.—Ed. Note.

Recovery of Consideration Agreed to Be Paid.—Where the State Highway and Public Works Commission has failed to pay consideration for a right of way easement

ment executed by landowners in accordance with an agreement between them and the Commission, the landowners may bring an action at law in the superior court to recover such consideration, and a special proceeding under this section and G. S. 136-19 is not proper. *Sale v. State Highway & Public Works Comm.*, 242 N. C. 612, 89 S. E. (2d) 290 (1955).

What Petition Must Allege.—

The petition must allege an effort to purchase by private negotiation and the names and residences of the owners. *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

In a special proceeding to assess compensation for land of an educational institution taken for highway purposes, it is not required that petitioners allege with particularity the various respects in which the property has been adversely affected by the new highway, and since evidence in support of all elements of damage recoverable is competent under the general allegation of damage, petitioners are not prejudiced by an order striking from the petition allegations relating thereto. *Gallimore v. State Highway, etc., Comm.*, 241 N. C. 350, 85 S. E. (2d) 392 (1955).

Clerk Has Jurisdiction.—

In accord with 2nd paragraph in original. See *Red Springs City Board of Education v. McMillan*, 250 N. C. 485, 108 S. E. (2d) 895 (1959).

Description of Property, etc.—

The condemnor must "first locate the property." *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

It is for the condemnor to determine what land it seeks to condemn and to describe it in its petition by reference to uncontested monuments. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

A controversy as to what land a condemnor is seeking to condemn has no place in a condemnation proceeding. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

Only Property Described May Be Acquired.—Ordinarily, absent an amendment, the only property a condemnor may acquire is that described in the petition. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

Right of Landowner to Obtain Description.—The statutory procedure described in this section for the award of just compensation to the owner of private property appropriated to public use presupposes that the owner shall know with

certainty the exact limits of the appropriation made by State Highway and Public Works Commission. *Cannon v. Wilmington*, 242 N. C. 711, 89 S. E. (2d) 595 (1955).

If the State Highway and Public Works Commission claims a right of way over land, the landowner is entitled as a matter of right to require that the Commission define with particularity the location and extent of its claim; and, if it refuses or fails to do so, the landowner can invoke the remedy of mandamus. *Cannon v. Wilmington*, 242 N. C. 711, 89 S. E. (2d) 595 (1955).

Joiner of All Parties Having Interest in Land Required.—In an action by the owner of an interest in lands against the State Highway Commission to recover compensation for the taking of a portion of the land, the joinder, as a respondent, of the owner of the other interest in the land cannot result in a misjoinder of parties and causes, since the action is to enforce a single right to recover compensation, and the joinder of all parties having an interest in the land is required by this section. *Tyson v. State Highway Comm.*, 249 N. C. 732, 107 S. E. (2d) 630 (1959).

Determining Respective Interests of Parties.—While this section contemplates that the respective interests of all parties who claim an estate or assert an interest in the real estate are to be determined in such proceedings, it contains no provision as to when or in what manner such determination is to be made. *Barnes v. North Carolina State Highway Comm.*, 257 N. C. 507, 126 S. E. (2d) 732 (1962).

The owner of land may not maintain a proceeding for the assessment of damages under this section until there has been a taking of his property under the power of eminent domain, and demurrer to the petition is properly sustained when its allegations amount to no more than that respondent had threatened to take an easement and had made preliminary surveys incidental thereto, since in such instance the petition fails to allege a taking of the property. *Penn v. Carolina Virginia Coastal Corp.*, 231 N. C. 481, 57 S. E. (2d) 817 (1950).

This section does not state when "the owner of land sought to be condemned" may proceed to have the land appraised. However, the right to have such appraisal must necessarily be predicated upon a taking of the property by the corporation possessing the right of eminent domain. And "taking" under the power of eminent domain may be defined as "entering upon

private property for more than a momentary period, and, under warrant or color of legal authority, devoting it to a public use, or otherwise informally appropriating or injuriously affecting it in such a way as substantially to oust the owner and deprive him of all beneficial enjoyment thereof." *Penn v. Carolina Virginia Coastal Corp.*, 231 N. C. 481, 57 S. E. (2d) 817 (1950).

This section does not require the court to try and determine the validity of a claim of ownership advanced by an omitted claimant before it permits him to intervene in the proceeding for the purpose of asserting his claim. *Raleigh v. Edwards*, 234 N. C. 528, 67 S. E. (2d) 669 (1951).

§ 40-13. How process served.

Applied in *United States v. Parks*, 211 F. Supp. 516 (1962).

§ 40-14. Service where parties

A condemnation proceeding by the United States under which it claimed title complied with Title 40 USC §§ 257 and 258 and this section, and was sufficient to

Applied in *Laughter v. State Highway*, etc., Comm., 238 N. C. 512, 78 S. E. (2d) 252 (1953); *Sale v. State Highway*, etc., Comm., 238 N. C. 599, 78 S. E. (2d) 724 (1953).

Cited in *Williams v. North Carolina State Highway Commission*, 252 N. C. 772, 114 S. E. (2d) 782 (1960); *Ferrell v. North Carolina State Highway Comm.*, 252 N. C. 830, 115 S. E. (2d) 34 (1960); *Bane v. Norfolk-Southern R. Co.*, 259 N. C. 285, 130 S. E. (2d) 406 (1963); *Sherrill v. N. C. State Highway Comm'n*, 264 N.C. 643, 142 S.E.2d 653 (1965).

§ 40-15. How process served.

Applied in *United States v. Parks*, 211 F. Supp. 516 (1962).

§ 40-16. Answer to petition; hearing; commissioners appointed.

Clerk Is to Hold Hearing Only after Notice to Parties.—The implication of this section is plain that the clerk is to hold the hearing on the challenge only after notice to the parties. *Collins v. State Highway*, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

Quoted in *Wescott v. State Highway Comm'n*, 262 N.C. 522, 138 S.E.2d 133

unknown.

give notice to all unknown claimants of any interest in the tracts of land described therein. *United States v. Chatham*, 208 F. Supp. 220 (1962).

(1964).

Cited in *Raleigh v. Edwards*, 235 N. C. 671, 71 S. E. (2d) 396 (1952); *Gallimore v. State Highway*, etc., Comm., 241 N. C. 350, 85 S. E. (2d) 392 (1955); *Gatling v. State Highway & Public Works Comm.*, 245 N. C. 66, 95 S. E. (2d) 131 (1956).

§ 40-17. Powers and duties of commissioners.

Local Modification. — City of Greensboro: 1951, c. 707, s. 3.

Notice to Parties.—When this statutory provision is obeyed by the commissioners, the parties to the proceeding receive notice of the filing of their report. This is necessarily so because this section requires the commissioners to give the parties or their attorneys notice of the meeting at which the report is adopted and ordered filed. *Collins v. State Highway*, etc., Comm., 237 N. C. 277, 74 S. E. (2d) 709 (1953).

Commissioners Do Not Pass on Facts Prerequisite to Recovery for Alleged Ap-

propriation.—The statutory procedure for condemnation does not contemplate that commissioners pass upon issues of fact prerequisite to an adjudication as to whether a landowner is entitled to recover for an alleged appropriation by use of an easement of flight. *City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E.2d 341 (1965).

Cited in *Gallimore v. State Highway*, etc., Comm., 241 N. C. 350, 85 S. E. (2d) 392 (1955); *Gatling v. State Highway & Public Works Comm.*, 245 N. C. 66, 95 S. E. (2d) 131 (1956).

§ 40-18. Form of commissioners' report.

Cited in *Morganton v. Hutton & Bourbons Co.*, 251 N. C. 531, 112 S. E. (2d) 111 (1960).

§ 40-19. Exceptions to report; hearing; appeal; when title vests; restitution.—Within twenty days after filing the report the corporation or any person interested in the said land may file exceptions to said report, and upon the determination of the same by the court, either party to the proceedings may appeal to the court at term, and thence, after judgment, to the Supreme Court. The court or judge on the hearing may direct a new appraisal, modify or confirm the report, or make such order in the premises as to him shall seem right and proper. If the said corporation, at the time of the appraisal, shall pay into court the sum appraised by the commissioners, then and in that event the said corporation may enter, take possession of, and hold said lands, notwithstanding the pendency of the appeal, and until the final judgment rendered on said appeal. And if there shall be no appeal, or if the final judgment rendered upon said petition and proceedings shall be in favor of the corporation, and upon the payment by said corporation of the sum adjudged, together with the costs and counsel fees allowed by the court, into the office of the clerk of the superior court, then and in that event all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such easement in such real estate during the corporate existence of the corporation aforesaid or if the proceedings have been instituted by such corporation to acquire a fee simple title to such real estate, then all persons who have been made parties to the proceedings shall be divested and barred of all right, title and interest in such real estate. The original of such judgment or a certified copy thereof, such original or certified copy to be under the seal of the court if recorded outside the county in which the court rendering the judgment is located, shall be registered in the county where the land is situated, and the original judgment or a certified copy thereof or a certified copy of the registered instrument may be given in evidence in all actions and proceedings as deeds for land are now allowed to be read in evidence. All real estate acquired by any corporation under and pursuant to the provisions of this chapter for its purposes shall be deemed to be acquired for the public use. But if the court shall refuse to condemn the land, or any portion thereof, to the use of such corporation, then, and in that event, the money paid into court, or so much thereof as shall be adjudged, shall be refunded to the corporation. And the corporation shall have no right to hold said land not condemned, but shall surrender the possession of the same, on demand, to the owner or owners, or his or their agent or attorney. And the court or judge shall have full power and authority to make such orders, judgments and decrees, and issue such executions and other process as may be necessary to carry into effect the final judgment rendered in such proceedings. If the amount adjudged to be paid the owner of any property condemned under this chapter shall not be paid within one year after final judgment in the proceeding, the right under the judgment to take the property or rights condemned shall ipso facto cease and determine, but the claimant under the judgment shall still remain liable for all amounts adjudged against him except the consideration for the property. (Code, s. 1946; 1893, c. 148; Rev., s. 2587; 1915, c. 207; C. S., s. 1723; 1951, c. 59, s. 2; 1955, c. 29, s. 1.)

Editor's Note.—The 1951 amendment added the part of the fourth sentence relating to proceedings to acquire a fee simple title. The 1955 amendment, which rewrote the fifth sentence, effective as of February 8, 1955, provided in section 2 that "all judgments heretofore registered in such manner as to comply with the requirements of G. S. 40-19 as amended by this act are hereby validated."

Power of Acquiring Fee Not Restricted.—The legislature did not intend, by referring in this section to the procedure to

be used in acquiring by condemnation, to restrict the power of acquiring in fee when necessary. The reference was merely for procedural purposes. *Morganton v. Hutton & Bourbonnais Co.*, 251 N. C. 531, 112 S. E. (2d) 111 (1960).

Interest from Rendition of Judgment.—

The judgment in an action must correspond with the verdict, and where, in condemnation proceedings tried in the superior court on appeal, the jury have in their verdict ascertained the damages to the owner of the land, the verdict will be pre-

sumed to include the element of interest, nothing else appearing, and it is reversible error for the trial judge to allow interest from the time the damages were determined upon by the appraisers and render judgment accordingly. *Red Springs City Board of Education v. McMillan*, 250 N. C. 485, 108 S. E. (2d) 895 (1959).

Exceptions Filed on Twenty-First Day.—In the absence of notice of the meeting of commissioners as required by G. S. 40-17, the filing of exceptions by the landowner on the twenty-first day after the filing of the report was held timely. *Gatling v. State Highway & Public Works Comm.*, 245 N. C. 66, 95 S. E. (2d) 131 (1956).

Exceptions Filed Nunc Pro Tunc.—The judge has the discretionary power to allow the exceptions mentioned in this section to be filed nunc pro tunc. *Gatling v. State Highway & Public Works Comm.*, 245 N. C. 66, 95 S. E. (2d) 131 (1956).

Clerk to Make Determination on Exceptions Only after Notice.—The implication of this section is indisputable that the clerk is to make his determination on the exceptions only after notice and an opportunity to be heard thereon is given the parties. *Collins v. State Highway, etc., Comm.*, 237 N. C. 277, 74 S. E. (2d) 709 (1953).

Title Is Not Divested Until Final Judgment and Payment of Damages to Landowner.—The title of the landowner is not divested unless and until the condemner obtains a final judgment in his favor and pays to the landowner the amount of the damages fixed by such final judgment. *Topping v. State Board of Education*, 249 N. C. 291, 106 S. E. (2d) 502 (1959); *North Carolina State Highway Comm'n v.*

§ 40-20. Provision for jury trial on exceptions to report.—In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire any real property or easements with respect thereto or rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by jury be demanded. (1893, c. 148; Rev., s. 2588; C. S., s. 1724; 1957, c. 582.)

Editor's Note.—

The 1957 amendment inserted in lines four and five the words "any real property or easements with respect thereto or."

Limitations on Right, etc.—

In accord with 2nd paragraph in original. See *Kaperonis v. North Carolina State Highway Comm'n*, 260 N.C. 587, 133

York Industrial Center, Inc., 263 N.C. 230, 139 S.E.2d 253 (1964).

Payment of Damages into Court Does Not Vest Title in Condemner.—In proceedings to condemn land for a school site, the payment into court by the county board of education of the amount of damages assessed by the commissioners and the taking of possession by it under order of the clerk, while the cause remained pending for trial on exceptions directed both to petitioner's right to condemn and to the adequacy of the damages awarded by the commissioners, did not vest title in the board. *Topping v. State Board of Education*, 249 N. C. 291, 106 S. E. (2d) 502 (1959).

The counsel fees authorized, etc.—

In accord with original. See *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

Condemner May Not Take Voluntary Nonsuit after Obtaining Temporary Possession.—A condemner may not, as a matter of right, take a voluntary nonsuit, over the landowner's objection, after obtaining temporary possession by payment of the amount of damages assessed by the commissioners, but this is because the landowner may, if he elects to do so, assert his claim for damages on account of the condemner's possession *pendente lite*. *Topping v. State Board of Education*, 249 N. C. 291, 106 S. E. (2d) 502 (1959).

Cited in *Proctor v. State Highway, etc., Comm.*, 230 N. C. 687, 55 S. E. (2d) 479 (1949); *Gallimore v. State Highway, etc., Comm.*, 241 N. C. 350, 85 S. E. (2d) 392 (1955); *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963); *City of Charlotte v. Spratt*, 263 N.C. 656, 140 S.E.2d 341 (1965).

§ 40-20. Provision for jury trial on exceptions to report.—In any action or proceeding by any railroad or other corporation to acquire rights of way or real estate for the use of such railroad or corporation, and in any action or proceeding by any city or town to acquire any real property or easements with respect thereto or rights of way for streets, any person interested in the land, or the city, town, railroad or other corporation shall be entitled to have the amount of damages assessed by the commissioners or jurors heard and determined upon appeal before a jury of the superior court in term, if upon the hearing of such appeal a trial by jury be demanded. (1893, c. 148; Rev., s. 2588; C. S., s. 1724; 1957, c. 582.)

S.E.2d 464 (1963).

Court Enters Judgment upon Verdict of Jury.—Upon appeal from the award of the appraisers in condemnation proceedings the trial in the superior court is *de novo*, and must proceed so far as the question of damages is concerned as though no commissioners of appraisal had ever been

appointed, and therefore the court properly enters judgment upon the verdict of the jury regardless of whether it is greater or smaller than the award of the commissioners and regardless of which party took the appeal. *Proctor v. State Highway, etc., Comm.*, 230 N. C. 687, 55 S. E. (2d) 479 (1949).

§ 40-23. Rights of claimants of fund determined.

Section Not Mandatory as to Manner of Determining Interests of Parties.—This section contains no mandatory provision as to when or in what manner the respective interests are to be determined. *Barnes v. North Carolina State Highway Comm.*, 257 N. C. 507, 126 S. E. (2d) 732 (1962).

It Does Not Deprive Claimant of Right to Jury Trial on Controverted Issues of Fact.—The provision of this section that the court "may determine who is entitled to the same and direct to whom the same shall be paid" contemplates a situation where such determination may be made as a matter of law, and it does not deprive any claimant of his right to a jury trial as to controverted issues of fact. *Barnes v. North Carolina State Highway Comm.*, 257 N. C. 507, 126 S. E. (2d) 732 (1962).

Who May Be "Claimants."—The phrase "adverse and conflicting claimants" is limited to (a) those who assert adverse titles to the property and hence a conflict in interest as to the party entitled to the sum awarded, or (b) those who are in agreement as to their respective titles but are in disagreement as to the value of their respective estates and hence the proportion of the award to which each is en-

titled. *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

Cited in Gallimore v. State Highway, etc., Comm., 241 N. C. 350, 85 S. E. (2d) 392 (1955).

tituled. *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

The phrase "adverse and conflicting claimants" does not include condemnor. *Virginia Electric & Power Co. v. King*, 259 N. C. 219, 130 S. E. (2d) 318 (1963).

Claimant May Except to Order of Compulsory Reference.—The provision of this section that the court "may in its discretion order a reference to ascertain the facts on which such determination and order are to be made" does not deprive any claimant of his right to except to an order of compulsory reference and preserve his right to a jury trial as to controverted issues of fact. *Barnes v. North Carolina State Highway Comm.*, 257 N. C. 507, 126 S. E. (2d) 732 (1962).

Trial of Collateral Issues Should Be Separate.—Ordinarily, the trial of collateral issues, involving a determination of what the respective claimants own, should be separate from the trial to determine the gross amount the Highway Commission is required to pay. *Barnes v. North Carolina State Highway Comm.*, 257 N. C. 507, 126 S. E. (2d) 732 (1962).

§ 40-24. Attorney for unknown parties appointed; pleadings amended; new commissioners appointed.

Counsel fees, etc.—

The counsel fees the court is authorized to tax in condemnation proceedings under § 40-19 are fees to counsel appointed by the court "to appear for and protect the

rights of any party in interest who is unknown or whose residence is unknown" in accordance with this section. *Carolina Power & Light Co. v. Creasman*, 262 N.C. 390, 137 S.E.2d 497 (1964).

§ 40-26. Change of ownership pending proceeding.

The right to convey, etc.—

Since the title of the person who owned the land immediately prior to the commencement of the proceedings is not divested until compensation is paid, he can sell. *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

Subsequent Purchaser, etc.—

The person who owns when the award is confirmed is the person to be compensated. *North Carolina State Highway Comm'n v. York Industrial Center, Inc.*, 263 N.C. 230, 139 S.E.2d 253 (1964).

ARTICLE 3.

*Public Works Eminent Domain Law.***§ 40-30. Title of article.**

Cross Reference.—As to condemnation of land for restoration of Tryon's Palace, see annotation under § 121-8.

Cited in *Penn v. Carolina Virginia*

Coastal Corp., 231 N. C. 481, 57 S. E. (2d) 817 (1950); *In re Housing Authority*, 235 N. C. 463, 70 S. E. (2d) 500 (1952).

§ 40-31. Finding and declaration of necessity.

Cited in *In re Housing Authority*, 233 N. C. 649, 65 S. E. (2d) 761 (1951).

§ 40-32. Definitions.

Cited in *In re Housing Authority*, 233 N. C. 649, 65 S. E. (2d) 761 (1951).

§ 40-33. Institution of proceedings; venue; immediate hearing; entry upon land by petitioner.

Editor's Note.—The above catchline has been reprinted to correct an error.

§ 40-34. Filing and form of petition.

Editor's Note.—The above catchline has been reprinted to correct an error.

§ 40-36. Notice of proceedings.

Cited in *In re Housing Authority*, 233 N. C. 649, 65 S. E. (2d) 761 (1951).

§ 40-37. Determination of issues raised by objections; waiver by failure to file; final judgment; guardian ad litem.

Discretion of Commissioners.—In determining what property is necessary for a public housing site, a broad discretion is vested by statute in housing authority commissioners, to whom the power of

eminent domain is delegated. *Housing Authority of City of Wilson v. Wooten*, 257 N. C. 358, 126 S. E. (2d) 101 (1962).

Cited in *In re Housing Authority*, 233 N. C. 463, 70 S. E. (2d) 500 (1952).

§ 40-53. Necessity for certificate of public convenience and necessity from Utilities Commission.

In General.—In construing this section, Justice Denny, in the case of *In re Housing Authority of Charlotte*, 233 N. C. 649, 65 S. E. (2d) 761 (1951), says: "We think the finding of public convenience and necessity, either in general or specific terms, as pointed out in G. S. 40-53, has reference to any finding made 'either in general or specific' terms by the legislature and set forth in the Housing Authorities Law, which findings shall not be sufficient to warrant the exercise of eminent domain in connection with any project authorized thereby. But a certificate of public convenience and necessity for such project must be obtained from the Utilities Commission—that is, the public need for such a project in a particular community must be made to appear and a certificate of public convenience and necessity must be obtained before the petitioner may proceed

to condemn property for such project." *State v. Story*, 241 N. C. 103, 84 S. E. (2d) 386 (1954).

Acquisition of Land by Wild Life Resources Commission.—The Wild Life Resources Commission has been delegated the power to acquire land for game farms or game refuges in the public interest, under §§ 113-84 and 143-237 et seq., but the public need for such a project in a particular locality must first be established by a certificate of public convenience and necessity from the North Carolina Utilities Commission under § 40-53. *State v. Story*, 241 N. C. 103, 84 S. E. (2d) 386 (1954).

Determination of Utilities Commission Presumed Valid.—The determination by the Utilities Commission of an application for a certificate of public convenience and necessity is presumed valid and will not be disturbed unless it is made to ap-

pear that it is clearly unreasonable and unjust. *In re Department of Archives & History*, 246 N. C. 392, 98 S. E. (2d) 487 (1957).

Quoted in *In re Housing Authority*, 233 N. C. 649, 65 S. E. (2d) 761 (1951).
Cited in *In re Housing Authority*, 235 N. C. 463, 70 S. E. (2d) 500 (1952).

Chapter 41.

Estates.

Sec.

41-2.1. Right of survivorship in bank deposits created by written agreement.

Sec.

41-10.1. Trying title to land where State claims interest.

§ 41-1. Fee tail converted into fee simple.

I. GENERAL CONSIDERATION.

Editor's Note.—

For case law survey on real property, see 41 N. C. Law Rev. 500.

Cited in Lackey v. Hamlet City Board of Education, 258 N. C. 460, 128 S. E. (2d) 806 (1963).

II. RULE IN SHELLEY'S CASE.

Nature and Operation of Rule.—

Where the conveyance is to the first taker for life and then by whatever language employed to his bodily heirs or heirs of his body, the rule in Shelley's case applies and the first taker acquires a fee. *Whitson v. Barnett*, 237 N. C. 483, 75 S. E. (2d) 391 (1953).

When a devise is to a named person for life with remainder after his death to "his heirs" or "his bodily heirs" or the "heirs of his body," nothing else appearing, the devisee becomes seized of a fee simple estate upon the death of the testator subject to any prior life estate created by the will. *Hammer v. Brantley*, 244 N. C. 71, 92 S. E. (2d) 424 (1956).

Force of Rule in North Carolina.—

In accord with original. See *Hammer v. Brantley*, 244 N. C. 71, 92 S. E. (2d) 424 (1956).

III. APPLICATION AND ILLUSTRATIVE CASES.

Deed to Daughter, "Her Children or Heirs."—Grantors executed a deed to their daughter and "her children or heirs." At the time of the execution of the deed the daughter had no children. It was held that the deed conveyed an estate tail to the daughter, which estate is converted into a fee simple by this section, and the daughter had power to dispose of the property by will. *Davis v. Brown*, 241 N. C. 116, 84 S. E. (2d) 334 (1954).

Conveyance to One and His Children.— Where a conveyance is made to A and his children, and A has children at the time the deed is executed, A and his children take as tenants in common, but if A has no children at the time the deed is executed, A takes an estate tail which is converted into a fee by this section. *Davis v. Brown*, 241 N. C. 116, 84 S. E. (2d) 334 (1954).

Devise to Go on Devisees' Deaths to Their "Children & So On."—Where testatrix stated she "wanted" the land in question to go to her brother and at his death to his three sons and his named grandson, with further provision that at their deaths testatrix "wanted" the land to go to their "children & so on," the brother took a life estate with remainder to his children and the named grandson in fee under the Rule in Shelley's Case, since it is apparent that testatrix used the word "children" in the sense of an indefinite line of succession and created an estate tail converted into a fee by this section. *In re Will of Wilson*, 260 N.C. 482, 133 S.E.2d 189 (1963).

Where Words "Bodily Heirs" Not Used in Technical Sense.—If it appears by correct construction that the words "bodily heirs" are not used in the technical sense as conveying the estate to the entire line of heirs of the first taker, as inheritors under the canons of descent, but as words designating certain persons, the rule in Shelley's case does not apply. *Whitson v. Barnett*, 237 N. C. 483, 75 S. E. (2d) 391 (1953).

Where the conveyance was made "to Roy Whitson and bodily heirs, and their heirs and assigns," Roy Whitson being the father of four children, it was held that the words "bodily heirs" were intended to mean children and not heirs general in the

technical sense. The words were interpreted to mean "to Roy Whitson and children, and their heirs and assigns." *Whitson v. Barnett*, 237 N. C. 483, 75 S. E. (2d) 391 (1953).

§ 41-2. Survivorship in joint tenancy abolished; proviso as to partnership.

I. GENERAL CONSIDERATION.

Survivorship Only Abolished as Incident of Joint Tenancy. — This section abolished survivorship only where it follows as a legal incident to an existing joint tenancy. *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964).

Survivorship May Be Provided for by Contract. —

In accord with original. See *Bunting v. Cobb*, 234 N. C. 132, 66 S. E. (2d) 661 (1951); *Wilson County v. Wooten*, 251 N. C. 667, 111 S. E. (2d) 875 (1960).

This section does not operate to prohibit persons from entering into written contracts as to lands so as to make future rights of the parties depend upon survivorship. *Vettori v. Fay*, 262 N.C. 481, 137 S.E.2d 810 (1964).

Survivorship in Personality, etc.—

In accord with original. See *Bowling*

A deed to grantor's wife "and to her heirs" by grantor, conveys a fee tail special, converted by this section into a fee simple absolute. *Pittman v. Stanley*, 231 N. C. 327, 56 S. E. (2d) 657 (1949).

v. *Bowling*, 243 N. C. 515, 91 S. E. (2d) 176 (1956).

II. ESTATES OF HUSBAND AND WIFE.

Section Inapplicable to Conveyances, etc.—

In accord with 2nd paragraph in original. See *Woolard v. Smith*, 244 N. C. 489, 94 S. E. (2d) 466 (1956).

Survivorship in Joint Bank Accounts. — Where agreements of husband and wife relating to savings accounts provide that the accounts are held by them as joint tenants with right of survivorship, and not as tenants in common, the right of survivorship exists pursuant to the contracts, and upon the death of the husband the widow is entitled to take the whole. *Bowling v. Bowling*, 243 N. C. 515, 91 S. E. (2d) 176 (1956).

§ 41-2.1. Right of survivorship in bank deposits created by written agreement. — (a) A deposit account may be established with a banking institution in the names of two or more persons, payable to either or the survivor or survivors, with incidents as provided by subsection (b) of this section, when both or all parties have signed a written agreement, either on the signature card or by separate instrument, expressly providing for the right of survivorship.

(b) A deposit account established under subsection (a) of this section shall have the following incidents:

- (1) Either party to the agreement may add to or draw upon any part or all of the deposit account, and any withdrawal by or upon the order of either party shall be a complete discharge of the banking institution with respect to the sum withdrawn.
- (2) During the lifetime of both or all the parties, the deposit account shall be subject to their respective debts to the extent that each has contributed to the unwithdrawn account. In the event their respective contributions are not determined, the unwithdrawn fund shall be deemed owned by both or all equally.
- (3) Upon the death of either or any party to the agreement, the survivor, or survivors, becomes the sole owner, or owners, of the entire unwithdrawn deposit subject to the claims of the creditors of the deceased and to governmental rights in that portion of the unwithdrawn deposit which would belong to the deceased had said unwithdrawn deposit been divided equally between both or among all the joint tenants at the time of the death of said deceased.
- (4) Upon the death of one of the joint tenants provided herein the banking institution in which said joint deposit is held shall pay to the legal representative of the deceased, the portion of the unwithdrawn deposit made subject to the claims of the creditors of the deceased and to governmental rights as provided in subdivision (3) above, and may

pay the remainder to the surviving joint tenant or joint tenants. Said legal representative shall hold the portion of said unwithdrawn deposit paid to him and not use the same for the payment of the claims of the creditors of the deceased or governmental rights unless and until all other personal assets of the estate have been exhausted, and shall then use so much thereof as may be necessary to pay any remaining debts of the deceased or governmental claims. Any part of said unwithdrawn deposit not used for the payment of such debts or charges of administration of the deceased shall, upon the settlement of the estate, be paid to the surviving joint tenant or tenants.

(c) This section shall be subject to the provisions of law applicable to transfers in fraud of creditors.

(d) This section shall not be deemed exclusive; deposit accounts not conforming to this section, and other property jointly owned, shall be governed by other applicable provisions of the law.

(e) As used in this section:

(1) "Banking institution" includes commercial banks, industrial banks, building and loan associations, savings and loan associations, and credit unions.

(2) "Deposit account" includes both time and demand deposits in commercial banks and industrial banks, installment shares, optional shares and fully paid share certificates in building and loan associations and savings and loan associations, and deposits and shares in credit unions.

(3) "Unwithdrawn deposit" shall be the amount in the deposit account held by the banking institution at the time of the death of the joint tenant; provided, however, that the banking institution shall not be held responsible for any amount properly paid out of said account prior to notice of such death.

(f) Nothing herein contained shall be construed to repeal or modify any of the provisions of G. S. 105-24 relating to the administration of the inheritance laws or any other provisions of the law relating to inheritance taxes.

(g) A deposit account under subsection (a) of this section may be established by a written agreement in substantially the following form:

"We, the undersigned, hereby agree that all sums deposited at any time, including sums deposited prior to this date, in the (name of institution) in the joint account of the undersigned, shall be held by us as co-owners with the right of survivorship, regardless of whose funds are deposited in said account and regardless of who deposits the funds in said account. Either or any of us shall have the right to draw upon said account, without limit, and in case of the death of either or any of us the survivor or survivors shall be the sole owner or owners of the entire account. This agreement is governed by the provisions of § 41-2.1 of the General Statutes of North Carolina."

Witness our hands and seals, this day of, 19.....

.....(Seal)

.....(Seal)

.....(Seal)

.....(Seal)"

(1959, c. 404; 1963, c. 779.)

Editor's Note. — The 1963 amendment rewrote this section.

Rights of Creditors. — The legislature has not enacted any statute with respect to the rights of creditors against property held by virtue of a contract creating a joint tenancy with right of survivorship, except

as to the right of survivorship in bank deposits created by a written agreement by husband and wife as provided by this section. *Wilson County v. Wooten*, 251 N. C. 667, 111 S. E. (2d) 875 (1960).

Cited in *Smith v. Smith*, 255 N. C. 152, 120 S. E. (2d) 575 (1961).

§ 41-4. Limitations on failure of issue.

Purpose of Section.—

The primary purpose of the enactment of this section was not to abrogate the rule which favors the early vesting of estates but it has been given that effect under certain circumstances in the North Carolina decisions. *Cabarrus Bank & Trust Co. v. Finlayson*, 286 F. (2d) 251 (1961).

This section was enacted in 1827 to meet the rule then generally prevailing in this country that a gift over on "death without issue" in a deed or will meant an indefinite failure of issue and hence was void for remoteness. *Cabarrus Bank & Trust Co. v. Finlayson*, 286 F. (2d) 251 (1961).

The law favors early indefeasible or absolute vesting of estates. As a corollary of this rule, such a construction is to be put upon conditional expressions, which render a testamentary gift defeasible, as to confine their operation to as early a period as the words of the will allow, so that it may become an absolute interest as soon as the language of the testator will permit. *Elmore v. Austin*, 232 N. C. 59, 59 S. E. (2d) 205 (1950).

Contingent Remaindermen Take Transmissible Estate.—Where there is a contingent executory devise to named persons in the event the first taker should die without issue, the persons who are to take the contingent limitation over are certain and only the event upon which they are to take is uncertain, and the contingent remaindermen take a transmissible estate which is not dependent upon their surviving the first taker, and upon the death of the contingent remaindermen prior to the death of the first taker without children then surviving, the estate goes to the heirs, next of kin, and successors of interest of the contingent remaindermen. *Seawell v. Cheshire*, 241 N. C. 629, 86 S. E. (2d) 256 (1955).

Roll Must Be Called as of Death of First Taker.—Dying without heirs or issue, upon which a limitation over takes effect, is referable to the death of the first taker of the fee without issue living at the time of his death, and not to the death of any other person or to any intermediate period. *House v. House*, 231 N. C. 218, 56 S. E. (2d) 695 (1949). See *Wachovia Bank & Trust Co. v. Waddell*, 234 N. C. 34, 65 S. E. (2d) 317 (1951); *Seawell v. Cheshire*, 241 N. C. 629, 86 S. E. (2d) 256 (1955).

First Taker Dying without Issue, etc.—
In accord with original. See *Seawell v.*

Cheshire, 241 N. C. 629, 86 S. E. (2d) 256 (1955).

Instances of Fee Simple Defeasible.—A devise to testator's four sons, but if any one of them should "fail to become a father of a living child by lawful wedlock" his share should revert to the estate, was held to devise a fee simple to each son, defeasible upon his death without having a living child born in wedlock, but which becomes a fee simple absolute as to each son upon the birth of him of a living child in wedlock. *Buffaloe v. Blalock*, 232 N. C. 105, 59 S. E. (2d) 625 (1950).

By residuary clause, testator devised the remainder of his estate to his four sons, his sole heirs at law, each to take a defeasible fee to become absolute as to each upon the birth of a living child in wedlock. It was held that testator intended to dispose of all the residue of his estate in the residuary clause, including any reversion, and therefore if the fee of any one of the sons should be defeated, the reversion would go to the estate and pass under the residuary clause to the other sons or their heirs, who would not take as purchasers under the will but by descent from the devisees, and therefore deed executed by the four sons conveys the fee simple absolute, since the deed of each would estop him or his heirs from claiming any reversionary interest if such interest should thereafter arise. *Buffaloe v. Blalock*, 232 N. C. 105, 59 S. E. (2d) 625 (1950).

Testator devised a life estate to his wife with provisions that at her death his lands should be divided among his living children, with particular description as to the share each should take, with further provision that one daughter (who had living children at the time the will was executed) should take a life estate in her share with remainder to her children, and that his other named daughters and three named sons should have their share in fee simple forever "And if either one of my daughters shall die without issue, their share of the lands shall be equally divided among" the three named sons. It was held that the words "shall die without issue" refer to the death of the devisees of the fee and not to the death of the life tenant, and the daughters took a defeasible fee so that upon the death of one of them without issue her surviving, her share became vested in the three named sons. *House v. House*, 231 N. C. 218, 56 S. E. (2d) 695 (1949).

Where a will provided that some of the beneficiaries shall each receive a percent-

age of the income from the trust estate for twenty years, then, as to all of these, the trust shall terminate and each shall receive a like percentage of the corpus of the trust absolutely, but should any of them die before the termination of the trust, the interest and corpus shall go to their respective surviving issue, but if any die without issue surviving, "their respective shares shall be added to the residue of (the) estate," each of the beneficiaries, at the death of testator, had a vested interest, subject to the twenty year trust, in his or her respective share in fee, defeasible upon dying without issue before the termination of the trust. *Little v. Wachovia Bank & Trust Co.*, 252 N. C. 229, 113 S. E. (2d) 689 (1960).

Where testatrix bequeathed property to her daughter or to the children of testatrix's son if the daughter should die childless, the daughter took only a defeasible title which terminated upon her death without children. *Cabarrus Bank & Trust Co. v. Finlayson*, 286 F. (2d) 251 (1961).

§ 41-5. Unborn infant may take by deed or writing.

Quoted in *Byerly v. Tolbert*, 250 N. C. 27, 108 S. E. (2d) 29 (1959).

§ 41-6. "Heirs" construed "children" in certain limitations.

Editor's Note.—For note on doctrine of worthier title, see 41 N. C. Law Rev. 317.

Conveyance Must Be to Heirs of Living Person. — This section applies only when the conveyance is to the heirs of a living person. *Scott v. Jackson*, 257 N. C. 658, 127 S. E. (2d) 234 (1962), commented on in 41 N. C. Law Rev. 317.

Devise to "Heirs of His Children."—A testator devised a lot to trustees for twenty years from the date of his death and provided that at the end of said period the estate should "be equally divided between the heirs of my children, per stirpes." By virtue of this section, the word "heirs" as used in this item of the will, must be construed to mean the "children" of the son and daughter of the testator. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949).

§ 41-7. Possession transferred

This section merges the legal and equitable titles, etc.—

The Statute of Uses, 27 Henry VIII, preserved in this State by this section, merges the legal and equitable titles in the beneficiary of a passive trust. *Wachovia Bank & Trust Co. v. Taylor*, 255 N. C. 122, 120 S. E. (2d) 588 (1961).

Instance of Fee Simple Determinable.—Testator devised lands to his daughter with further provision that the gift should become absolute if she improved the land by erecting a dwelling or if she should die leaving issue, but that if she should fail to improve the lot or should die without living issue, then the lands should be disposed of as directed in a subsequent item. It was held that the devise created a fee simple determinable, and under the rule of construction requiring that the fee simple absolute should vest as soon as the language of the testator permits, the ambiguous provisions for defeasance must be read so as to require both of the specified contingencies to occur before the fee should be defeated, and therefore upon the erection of a dwelling house upon the property of the daughter her fee became absolute. *Elmore v. Austin*, 232 N. C. 13, 59 S. E. (2d) 205 (1950).

Applied in *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949); *Blanchard v. Ward*, 244 N. C. 142, 92 S. E. (2d) 776 (1956).

Remainder to Living Heirs of Grantor.—Grantor conveyed the land in question to her son after the reservation of a life estate, and by habendum stipulated that the grantee should have an estate for the term of his natural life and at his death to his issue surviving, with further provision that should he die without issue "then to the living heirs of" the grantor. It was held that the other children of grantor have a remainder contingent upon the death of the grantee without issue, which interest cannot be defeated by a conveyance executed by the grantee with the joinder of the grantor. *Ellis v. Barnes*, 231 N. C. 543, 57 S. E. (2d) 772 (1950).

Applied in *Sprinkle v. Reidsville*, 235 N. C. 140, 69 S. E. (2d) 179 (1952); *Clarke v. Clarke*, 253 N. C. 156, 116 S. E. (2d) 449 (1960).

to use in certain conveyances.

Where conveyance of wife's property to trustee for her sole use and benefit during her life and, after her death, for the benefit of her husband was ineffective to create any estate or trust in favor of the husband because of noncompliance with § 52-12, a passive trust for the wife for her natural life was created and it was

executed by the statute. *Pilkington v. West*, 246 N. C. 575, 99 S. E. (2d) 798 (1957).

In a passive trust the legal and equitable titles are merged in the beneficiary by virtue of the statute of uses. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N. C. 371, 128 S. E. (2d) 867 (1963).

Rule Does Not Apply to Active Trusts.—

This section merges the legal and equitable titles in the beneficiary of a passive trust, but the rule established by the statute does not apply to active trusts. *Finch v. Honeycutt*, 246 N. C. 91, 97 S. E. (2d) 478 (1957).

If the trust is active the legal and equitable titles do not merge. *Poindexter v. Wachovia Bank & Trust Co.*, 258 N. C. 371, 128 S. E. (2d) 867 (1963).

An active trust is one where there is a special duty, etc.—

In accord with original. See *Finch v. Honeycutt*, 246 N. C. 91, 97 S. E. (2d) 478 (1957).

§ 41-8. Collateral warranties abolished; warranties by life tenants deemed covenants.

Remainder Not Defeated by Warranty.—

Under this section a warranty in a deed of a life tenant does not bar or rebut the claim of heirs who can connect themselves with the outstanding remainder.

§ 41-9. Spendthrift trusts.

Editor's Note. — For article on the spendthrift trust statute, see 31 N. C. Law Rev. 175. For article on spendthrift and other restraints in trusts in North Carolina, see 41 N. C. Law Rev. 49.

§ 41-10. Titles quieted.

I. GENERAL CONSIDERATION.

This Section Is Highly Remedial.—

In accord with 2nd paragraph in original. See *Wachovia Bank & Trust Co. v. Miller*, 243 N. C. 1, 89 S. E. (2d) 765 (1955).

This section deprives the defendant of no right, etc.—

The fact that the plaintiff brings his action under this section deprives the defendant of no right. He has the right to defend the validity of his alleged title on every relevant ground available in any type of action involving recovery or possession of real property. *Barbee v. Edwards*, 238 N. C. 215, 77 S. E. (2d) 646 (1953).

If title becomes involved in a proceeding, etc.—

In accord with original. See *Bumgarner*

Where there is any control to be exercised by the trustee or any duty to be performed by him in relation to the trust property or in regard to the beneficiaries, the trust is an active trust, and the legal and equitable titles do not merge in the beneficiaries. *Finch v. Honeycutt*, 246 N. C. 91, 97 S. E. (2d) 478 (1957).

Where a deed purports to convey land in trust, but prescribes no duties of any kind to be performed by the trustee, he is made a depositary only of title, and by operation of this section the legal, as well as the equitable, estate in the land passed to and became vested solely in the beneficiary. *Pippin v. Barker*, 233 N. C. 549, 64 S. E. (2d) 830 (1951).

Applied in *Craven County v. First Citizens Bank & Trust Co.*, 237 N. C. 502, 75 S. E. (2d) 620 (1953).

Cited in *Honeycutt v. Citizens Nat. Bank*, 242 N. C. 734, 89 S. E. (2d) 598 (1955).

This is so because such heirs take by purchase, i. e., as remaindermen, and not by descent, i. e., as heirs. *Sprinkle v. Reidsville*, 235 N. C. 140, 69 S. E. (2d) 179 (1952).

Cited in *In re Estate of Bulis*, 240 N. C. 529, 82 S. E. (2d) 750 (1954); *Pilkington v. West*, 246 N. C. 575, 99 S. E. (2d) 798 (1957).

v. Corpening, 246 N. C. 40, 97 S. E. (2d) 427 (1957).

Applied in *Doub v. Harper*, 234 N. C. 14, 65 S. E. (2d) 309 (1951); *Edwards v. Arnold*, 250 N. C. 500, 109 S. E. (2d) 205 (1959); *Clay v. Clay*, 259 N. C. 251, 130 S. E. (2d) 309 (1963); *Twiford v. Harrison*, 260 N.C. 217, 132 S.E.2d 321 (1963).

Cited in *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101 (1950).

II. NATURE AND SCOPE OF REMEDY.

A. Purpose.

To Broaden the Equitable Remedy.—

In accord with 2nd paragraph in original. See *East Carolina Lumber Co. v. Pamlico County*, 242 N. C. 728, 89 S. E. (2d) 381 (1955).

The General Assembly of 1893 enacted

the statute now codified as this section to avoid some of the limitations imposed upon the remedies formerly sought by a bill of peace or a bill *qua timet*, and to establish an easy method of quieting titles to land against adverse claims. *Wells v. Clayton*, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

B. Interest Necessary to Bring Action.

Generally.—

An action to quiet title under this section must be based upon plaintiffs' ownership of some title, estate, or interest in real property, and defendants' assertion of some claim adverse to plaintiffs' title, estate, or interest, which adverse claim must be presently determinable. *Vandiford v. Vandiford*, 241 N. C. 42, 84 S. E. (2d) 278 (1954).

Plaintiff Need Not Prove Estate in or Title to Land.—

In accord with original. See *Etheridge v. Wescott*, 244 N. C. 637, 94 S. E. (2d) 846 (1956).

The statutory action to quiet title to realty consists of two essential elements. The first is that the plaintiff must own the land in controversy, or have some estate or interest in it; and the second is that the defendant must assert some claim to such land adverse to the plaintiff's title, estate or interest. *Wells v. Clayton*, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

Remedy Given Whether in or out of Possession.—

Under this section, the plaintiff is not required to show that he is either in or out of possession. Nor is the plaintiff required to show that the defendant is an occupant or any more than a claimant of the land in controversy. *Barbee v. Edwards*, 238 N. C. 215, 77 S. E. (2d) 646 (1953).

Action Is Maintainable Though Plaintiff Might Have Maintained Ejectment.—This section is broad enough to cover an action to quiet the title to real property though the person sued may be wrongfully in possession and the plaintiff might have maintained ejectment. The complaint would not be demurrable merely for the reason that the allegations might be sufficient to support a possessory action. *Pressly v. Walker*, 238 N. C. 732, 78 S. E. (2d) 920 (1953).

C. What Constitutes Cloud.

Adverse Claim Must Be Presently Determinable.—This section applies only to the extent the alleged adverse claims are presently determinable. *Vandiford v. Van-*

diford, 241 N. C. 42, 84 S. E. (2d) 278 (1954).

Will of Living Person.—A paper writing, in form a will, executed by a person now living, is without legal significance either as a transfer of title or as a cloud thereon, until death of the testator and probate of the instrument. *Vandiford v. Vandiford*, 241 N. C. 42, 84 S. E. (2d) 278 (1954).

III. PLEADING AND PRACTICE.

A. In General.

When Suit Treated as Action of Ejectment.—

In accord with original. See *Baldwin v. Hinton*, 243 N. C. 113, 90 S. E. (2d) 316 (1955); *Hayes v. Ricard*, 244 N. C. 313, 93 S. E. (2d) 540 (1956).

The plaintiff is not bound to show as an independent proposition the invalidity and wrongfulness of the adverse claim. These matters are inseparably interwoven in the two essential elements of the action. The claim of the defendant is necessarily invalid and wrongful if it is adverse to the title, estate or interest of the true owner. *Wells v. Clayton*, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

The plaintiff is not required to allege or show the specific circumstances giving rise to the defendant's adverse claim, unless it is essential for the plaintiff to overcome such claim in order to establish his own title, estate or interest. Hence, it is ordinarily sufficient for the plaintiff to allege and show in general terms that the defendant is asserting some claim adverse to him. *Wells v. Clayton*, 236 N. C. 102, 72 S. E. (2d) 16 (1952).

B. Pleadings.

Sufficiency of Bill of Complaint.—

A complaint, which alleged that defendant city claimed, without legal right thereto, a right of way on and over plaintiff's land, and that such claim was a cloud on his title, was sufficient to state a cause of action within the purview of this section. *Cannon v. Wilmington*, 242 N. C. 711, 89 S. E. (2d) 595 (1955).

In an action to remove a cloud on title, a complaint alleging that defendants claimed under a receiver's deed and that the trustee in a prior deed of trust executed by the debtor was not a party to the receivership proceedings, is demurrable, since the mere fact that the trustee in the deed of trust was not a party does not in itself render the receiver's deed ineffectual. *East Carolina Lumber Co. v. Pamlico County*, 250 N. C. 681, 110 S. E. (2d) 278 (1959).

§ 41-10.1. Trying title to land where State claims interest.—Whenever the State of North Carolina or any agency or department thereof asserts a claim of title to land which has not been taken by condemnation and any individual, firm or corporation likewise asserts a claim of title to the said land, such individual, firm or corporation may bring an action in the superior court of the county in which the land lies against the State or such agency or department thereof for the purpose of determining such adverse claims. Provided, however, that this section shall not apply to lands which have been condemned or taken for use as roads or for public buildings. (1957, c. 514.)

Suit May Be Brought to Determine Extent of Easement Granted by State.—A controversy between an individual and the State as to the extent of an easement granted to the individual by the State may be made the basis of a suit against the State in the superior court under § 1-253,

since such suit involves title to realty within the purview of this section. Shingleton v. State, 260 N.C. 451, 133 S.E.2d 183 (1963).

Applied in East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E. (2d) 278 (1959).

§ 41-11. Sale, lease or mortgage in case of remainders.—In all cases where there is a vested interest in real estate, and a contingent remainder over to persons who are not in being, or when the contingency has not yet happened which will determine who the remaindermen are, there may be a sale, lease or mortgage of the property by a special proceeding in the superior court, which proceeding shall be conducted in the manner pointed out in this section. Said proceeding may be commenced by summons by any person having a vested interest in the land, and all persons in esse who are interested in said land shall be made parties defendant and served with summons in the way and manner now provided by law for the service of summons in other special proceedings, as provided by § 1-94, and service of summons upon nonresidents, or persons whose names and residences are unknown, shall be by publication as now required by law or such service in lieu of publication as now provided by law. In cases where the remainder will or may go to minors, or persons under other disabilities, or to persons not in being, or whose names and residences are not known, or who may in any contingency become interested in said land, but because of such contingency cannot be ascertained, the clerk of the superior court shall, after due inquiry of persons who are in no way interested in or connected with such proceeding, designate and appoint some discreet person as guardian ad litem, to represent such remainderman, upon whom summons shall be served as provided by law for other guardians ad litem, and it shall be the duty of such guardian ad litem to defend such actions, and when counsel is needed to represent him, to make this known to the clerk, who shall by an order give instructions as to the employment of counsel and the payment of fees.

(1951, c. 96.)

I. GENERAL CONSIDERATION.

Editor's Note. — The 1951 amendment inserted the words "special" before "proceeding" in line five, and substituted in the second sentence "special proceedings" for "civil actions." As only the first paragraph was affected by the amendment the rest of the section is not set out.

The remedial purpose of this section may be served where there are contingent remainders over to persons not in being, or the contingency has not happened which will determine who the ultimate remaindermen are, but to achieve the desired result the provisions of the statute must be observed. Barnes v. Dortch, 245 N.C. 369, 95 S.E. (2d) 872 (1957).

When Section Applicable.—

A sale under this section can be ordered only in a "special proceeding," which must be instituted before the clerk of the superior court, and the section has no application to an action for waste under § 1-533. Parrish v. Parrish, 247 N.C. 584, 101 S.E. (2d) 480 (1958).

Strict Compliance Required. — In order that a valid conveyance of the land in fee simple be made pursuant to this section, it is essential that the provisions of the statute be strictly complied with. Blades v. Spitzer, 252 N.C. 207, 113 S.E. (2d) 315 (1960).

Cited in Davis v. Griffin, 248 N.C. 539, 103 S.E. (2d) 728 (1958); Menzel v. Men-

zel, 250 N. C. 649, 110 S. E. (2d) 333 (1959).

II. ACTION IN SUPERIOR COURT FOR SALE.

Who May Institute Suit.—

The life beneficiary of a trust estate has a vested equitable estate therein so as to entitle her to institute proceedings for the sale of lands of the estate for reinvestment, and the trustees are proper parties to the proceeding. *Blades v. Spitzer*, 252 N. C. 207, 113 S. E. (2d) 315 (1960).

Plaintiff Must Have Vested Interest.—

See *Barnes v. Dortch*, 245 N. C. 369, 95 S. E. (2d) 872 (1957).

Necessary Parties.—

A special proceeding under this section to authorize the sale for reinvestment of certain land in which there are contingent interests must be brought by a person having a vested interest in the land and those, who on the happening of the contingency would presently have an estate in the property at the time the proceeding is commenced, made parties and served with summons. *Barnes v. Dortch*, 245 N. C. 369, 95 S. E. (2d) 872 (1957).

III. SALE AND REINVESTMENT.

Bond Required. — Where the court decrees a sale of trust property for reinvestment, the trustees should be required to give bond, or other legal provision should be made, to assure the safety of the funds arising from the sale, notwithstanding that the will provides that the trustees should not be required to give bond in administering the trust, since in acting under the decree of the court the trustees act as commissioners of the court and not necessarily as trustees under the will. *Blades v. Spitzer*, 252 N. C. 207, 113 S. E. (2d) 315 (1960).

IV. ILLUSTRATIVE CASES.

Where the grantors in a deed have erroneously assumed, etc.—

Testator devised land to his five brothers and sisters and a nephew "for their lives

§ 41-11.1. Sale, lease or mortgage of property held by a "class", where membership may be increased by persons not in esse.

Section Limited to Proceedings Involving Sale, Lease or Mortgage.—This section appears to be limited to actions or proceedings involving the sale, lease or

and then to their children." The life tenants partitioned the land into equal shares, and the lot partitioned to a surviving brother, aged 75 without children, was conveyed by the children of the four deceased life tenants and the other surviving life tenant and her children to the wife of the surviving brother. The petitioners who purchased the lot from the surviving brother and his wife were not entitled to sell it by virtue of a proceeding under this section where the heirs of the testator living at the time of the proceeding were not made parties, since upon the death of the brother without issue the land would revert to the heirs of the testator living at that time. *Barnes v. Dortch*, 245 N. C. 369, 95 S. E. (2d) 872 (1957).

A will devised a life estate to daughter with remainder to her children but she renounced her life estate and it was adjudicated that the renunciation of the life estate accelerated the vesting of title in members of the class in esse at the time. It was held that the acceleration of the estate of the remaindermen did not change the date when the final roll call will be made to ascertain members of the class, and although members of the class in esse are not required to account for rents and profits pending the birth of other members of the class, after-born children must be let in, and the fee simple title to the land cannot be conveyed prior to the death of the life tenant except for reinvestment pursuant to judicial decree. *Neill v. Bach*, 231 N. C. 391, 57 S. E. (2d) 385 (1950).

A devise of an estate in trust with provision that the income therefrom should be paid to a designated beneficiary for life and, upon her death, the corpus should be divided among her children, with further provision that the child or children of any deceased child of the life tenant should take such child's share, requires that the remaindermen be ascertained upon the falling in of the life estate, who then take under the will and not as heirs of the life tenant, so that this section is applicable. *Blades v. Spitzer*, 252 N. C. 207, 113 S. E. (2d) 315 (1960).

mortgage of property. *McPherson v. First & Citizens Nat. Bank*, 240 N. C. 1, 81 S. E. (2d) 386 (1954).

Chapter 42.

Landlord and Tenant.

Article 2.

Agricultural Tenancies.

Sec.

42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.

ARTICLE 1.

General Provisions.

§ 42-1. Lessor and lessee not partners.

Agreement Not Constituting Agricultural Partnership.—

See *Keith v. Lee*, 246 N. C. 188, 97 S. E. (2d) 859 (1957).

Applied in *Moss v. Hicks*, 240 N. C. 788,

83 S. E. (2d) 890 (1954).

Quoted in *Perkins v. Langdon*, 231 N. C. 386, 57 S. E. (2d) 407 (1950); *Johnson v. Gill*, 235 N. C. 40, 68 S. E. (2d) 788 (1952).

§ 42-2. Attornment unnecessary

Lessee Becomes Tenant of Grantee.—

When title passes, lessee ceases to hold under the grantor. He then becomes a tenant of grantee, and his possession is grantee's possession. *Pearce v. Gay*, 263

on conveyance of reversions, etc.

N.C. 449, 139 S.E.2d 567 (1965).

Rent Follows Reversion.—Rent due under a lease follows reversion. *Perkins v. Langdon*, 231 N. C. 386, 57 S. E. (2d) 407 (1950).

§ 42-3. Term forfeited for nonpayment of rent.

Necessity of Demand for Rent.—

Where the lease contains no forfeiture clause for failure to pay rent, lessors may assert forfeiture for nonpayment of rent only after 10 days from demand upon les-

sees for payment. *Reynolds v. Earley*, 241 N. C. 521, 85 S. E. (2d) 904 (1955).

Cited in *Duke v. Davenport*, 240 N. C. 652, 83 S. E. (2d) 668 (1954).

§ 42-6. Rents, annuities, etc., apportioned, where right to payment terminated by death.

Rents Payable on Days Tenants Sell Crops Are Payable at "Fixed Periods."—Where the rents reserved were $\frac{1}{3}$ of the sale price of the tobacco crops and were to be paid "at the warehouse" on the days the tenants sold tobacco, these sale days could not, of course, be designated in the lease, but they were no less "fixed periods" within the meaning of this section and "periodic payments" within the meaning of § 37-4. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Section Provides for Successive Owners under Same Instrument.—This section by

its terms makes provision for successive owners under the same instrument. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

Owner of Fee Does Not Own under Instrument Subsequently Executed.—Where the predecessor owner had the fee prior to the execution of the instrument under which the successive owners take, the former cannot be said to own by the instrument, i.e., the deed, will or trust indenture, by which the latter owners take. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 42-7. In lieu of emblements, rents apportioned.

Section Apportions Rents When Life Tenant Dies during Lease Year. —This section apportions rents on farm leases which it extends in lieu of emblements, when the life tenant dies during the lease year. *Wells v. Planters Nat'l Bank &*

farm lessee holds out year, with Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

But Only Applies If Such Death Determines Lease.—This section applies only to farm leases which are determined, inter alia, by the death of a life tenant. *Wells v.*

Planters Nat'l Bank & Trust Co., 265 N.C. 98, 143 S.E.2d 217 (1965).

Where a settlor of a trust terminating on the death of the income recipient authorizes the trustee to make leases beyond the term of the duration of the trust, the

leases so made do not terminate with the life tenant's death and this section does not apply. *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

§ 42-8. Grantees of reversion and assigns of lease have reciprocal rights under covenants.

Grantor Must Reserve Right If He Is to Collect Rents after Conveyance.—If the grantor is to collect rents accruing subsequent to the effective date of the conveyance, he must, by reservation in his deed, provide that grantee shall not be entitled to possession prior to the expiration of the term fixed in the lease, or otherwise expressly reserve his right to collect subsequently accruing rents. *Pearce v. Gay*, 263 N.C. 449, 139 S.E.2d 567 (1965).

Substitution of Note or Bond before Sale Relieves Lessee of Obligation to Pay Rent.—If lessee pays the rent before a sale, or executes a note or bond for the

rent in substitution of his contract to pay the rent, and such note or bond is accepted by the then owner in discharge of lessee's obligation to pay rent, such substitution relieves the lessee of his obligation to pay rent. Since he has no obligation to pay rent, he is not obligated to pay the purchaser; his obligation is to the holder of the note or bond. *Pearce v. Gay*, 263 N.C. 449, 139 S.E.2d 567 (1965).

Cited in *Perkins v. Langdon*, 237 N.C. 159, 74 S.E. (2d) 634 (1953); *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

§ 42-10. Tenant not liable for accidental damage.

Lessee Is under Implied Obligation to Use Reasonable Diligence Not to Injure Premises.—In every lease there is, unless excluded by the operation of some express covenant or agreement, an implied obligation on the part of the lessee to use reasonable diligence to treat the premises demised in such manner that no injury be done to the property, but that the estate may revert to the lessor undeteriorated by the wilful or negligent act of the lessee. The lessee's obligation is based upon the

maxim *sic utere tuo ut alienum non laedas*. *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

Thus, lessee is not liable for accidental damage by fire. *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

But he is liable if the buildings are damaged by his negligence. *Dixie Fire & Cas. Co. v. Esso Standard Oil Co.*, 265 N.C. 121, 143 S.E.2d 279 (1965).

ARTICLE 2.

Agricultural Tenancies.

§ 42-15. Landlord's lien on crops for rents, advances, etc.; enforcement.

II. LIEN OF LESSOR.

Landlord's Lien Superior.—

Under this section, a landlord has a preferred lien on the entire crop until the rent and all advancements made and expenses incurred in making and saving the crop are paid. *Eason v. Dew*, 244 N.C. 571, 94 S.E. (2d) 603 (1956).

Any lien created by subordinate contract made by tenant was subject to the primary and paramount lien in favor of landlord by virtue of this section. *Eason v. Dew*, 244 N.C. 571, 94 S.E. (2d) 603 (1956).

Subtenant's Lien for Labor.—Landlord's lien for rent and advancements held superior to subtenant's lien for labor under separate contract with tenant. *Eason v. Dew*, 244 N.C. 571, 94 S.E. (2d) 603 (1956).

Sale of Crop by Tenant.—The tenant, who owns the crop subject to the landlord's rights and lien, has the right to sell the crop but in the same plight in which he holds it, that is, the purchaser from the tenant takes subject to the landlord's lien and, where the crop remains on the land, the purchaser can remove the crop only by consent of the landlord until the rent is

paid. *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

Third Person Charged with Notice.—

See *Eason v. Dew*, 244 N. C. 571, 94 S. E. (2d) 603 (1956).

The landlord's lien exists by virtue of this section. No written instrument is required or contemplated. The registration acts, which apply only to written instruments capable of registration, have no significance relative to a landlord's lien. This section itself gives notice to all the world of the law relative to a landlord's lien. *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

Same—Caveat Emptor.—

The landlord's lien remains intact until the rent is paid, and all who deal with a tenant with reference to the crop are charged with notice thereof. Nothing short of an actual payment or a complete satisfaction of the lessor's demands, meets the words of this section or will serve to determine his lien, or title. Neither can the fact that purchasers of the crop had no notice of the landlord's claim at all impair it, in the absence of any suggestion of fraud on his part. It is a question of title, and the tenant can convey no better right to the property than he himself was possessed of. The principle of caveat emptor applies with full force to the case. *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

Lien Does Not Attach to Proceeds of Hail Insurance Policy.—Where a tenant procures and pays for a policy of hail storm insurance, nothing else appearing, the landlord's statutory crop lien for advancements under this section does not extend to the fund paid by insurer under the policy after damage to the crop by the risk covered. *Peoples v. United States Fire Ins. Co.*, 248 N. C. 303, 103 S. E. (2d) 381 (1958).

Waiver of Lien.—It is not to be understood that a landlord cannot by agreement, express or implied, waive his lien, or by his acts and conduct be estopped from asserting his lien. The gist of such affirmative defense is allegation and proof of such facts and circumstances as will establish the proposition that the landlord in effect

§ 42-15.1. Landlord's lien on crop insurance for rents, advances, etc.; enforcement.—Where lands are rented or leased by agreement, written or oral, for agricultural purposes, or are cultivated by a cropper, unless otherwise agreed between the parties to the lease or agreement, the landlord or his assigns shall have a lien on all the insurance procured by the tenant or cropper on the crops raised on the lands leased or rented to the extent of any rents due or advances made to the tenant or cropper.

To be entitled to the benefit of the lien herein provided, the landlord must

constituted the tenant his agent to sell the crop for their joint benefit and account to the landlord for his share out of the proceeds of sale. It is an affirmative defense which must be pleaded with certainty and particularity and established by the greater weight of the evidence. *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

Estoppel of Landlord to Assert Claim.—Where a landlord, who retained a lien on tobacco grown by his tenant, gave his AAA marketing card to his tenant in order that he might sell the tobacco in a warehouse, the landlord clothed the tenant with authority or apparent authority to receive payment for the tobacco and is now estopped to assert a claim against the warehouse for the amount of his lien on the tobacco. *Adams v. Growers' Warehouse*, 230 N. C. 704, 55 S. E. (2d) 331 (1949).

V. REMEDY OF LESSOR TO ENFORCE LIEN.

Remedies for Unauthorized Removal of Crop by Tenant.—This section vests the possession of the crop in the landlord, and, under this right of possession, he has the right to use force, if necessary, to prevent unauthorized removal by the tenant. Moreover, if the tenant, without the consent of the landlord, willfully removes the crop without giving five days' notice of removal, before satisfying the landlord's lien, he is guilty of a misdemeanor under G. S. 42-22. In such case, the tenant is liable both civilly and criminally; for the constructive possession of the crop is in the landlord. *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

Liability of Warehouse Purchasing from Tenant or Selling as His Agent.—Nothing else appearing, if a warehouse purchased tobacco from a tenant, or sold the tobacco as agent for the tenant, and paid the tenant therefor, without regard to the landlord's lien, the warehouse would be accountable to the landlord on the basis of money had and received for the proceeds of sale up to the balance due as rent. *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

conform as to the prices charged for advances under the provisions of article 10 of chapter 44 relating to agricultural liens.

The lien provided herein shall be preferred to all other liens on said insurance, and the landlord or his assigns shall be entitled to all the remedies at law for the enforcement of the lien. (1959, c. 1291.)

§ 42-22. Unlawful seizure by landlord or removal by tenant misde-monor.

Cited in *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

§ 42-22.1. Failure of tenant to account for sales under tobacco marketing cards.

Stated in *Hall v. Odom*, 240 N. C. 66, 81 S. E. (2d) 129 (1954).

§ 42-23. Terms of agricultural tenancies in certain counties.

This section shall only apply to the counties of Alamance, Anson, Ashe, Bladen, Brunswick, Columbus, Craven, Cumberland, Duplin, Edgecombe, Gaston, Greene, Halifax, Hoke, Jones, Lenoir, Lincoln, Montgomery, Onslow, Pender, Person, Pitt, Robeson, Sampson, Wayne and Yadkin. (Pub. Loc. 1929, c. 40; Pub. Loc. 1935, c. 288; Pub. Loc. 1937, cc. 96, 600; Pub. Loc. 1941, c. 41; 1943, c. 68; 1945, c. 700; 1949, c. 136; 1953, c. 499, s. 1; 1955, c. 136; 1959, c. 1076.)

Local Modification.—Harnett: 1955, c. 938.

Editor's Note.—

The 1953 amendment inserted "Alamance" in the second paragraph, and the 1955 amendment inserted "Wayne" therein. The 1959 amendment inserted "Per-

son" in the list of counties. As the first paragraph was not affected by the amendments it is not set out.

Cited in *Wells v. Planters Nat'l Bank & Trust Co.*, 265 N.C. 98, 143 S.E.2d 217 (1965).

ARTICLE 3.

Summary Ejectment.

§ 42-26. Tenant holding over may be dispossessed in certain cases.

I. APPLICATION AND SCOPE.

Relation of Landlord and Tenant Necessary.—

See *Ford v. Ford Moulding Co.*, 231 N. C. 105, 56 S. E. (2d) 14 (1949).

V. THE ACTION.

Evidence that the relationship of landlord and tenant existed between the parties

and that defendants were holding over after the expiration of the term was sufficient to take the case to the jury and support judgment for plaintiff in summary ejectment, and defendants' claim in respect to improvements is outside the scope of the proceeding and not justiciable therein. *Ford v. Ford Moulding Co.*, 231 N. C. 105, 56 S. E. (2d) 14 (1949).

§ 42-27. Local: Refusal to perform contract ground for dispossession.—When any tenant or cropper who enters into a contract for the rental of land for the current or ensuing year willfully neglects or refuses to perform the terms of his contract without just cause, he shall forfeit his right of possession to the premises. This section applies only to the following counties: Alamance, Alexander, Alleghany, Anson, Ashe, Beaufort, Bertie, Bladen, Brunswick, Burke, Cabarrus, Camden, Carteret, Caswell, Chatham, Chowan, Cleveland, Columbus, Craven, Cumberland, Currituck, Davidson, Duplin, Edgecombe, Forsyth, Franklin, Gaston, Gates, Greene, Guilford, Halifax, Harnett, Hertford, Hoke, Hyde, Jackson, Johnston, Jones, Lee, Lenoir, Martin, Mecklenburg, Montgomery, Moore, Nash, Northampton, Onslow, Pasquotank, Pender, Perquimans, Pitt, Polk, Randolph, Robeson, Rockingham, Rowan, Rutherford, Sampson, Stokes, Surry, Swain, Tyrrell, Union, Wake, Warren, Washington, Wayne, Wilson,

Yadkin. (4 Geo. II, c. 28; 1868-9, c. 156, s. 19; Code, ss. 1766, 1777; 1905, cc. 297, 299, 820; Rev., s. 2001, subsec. 4; 1907, cc. 43, 153; 1909, cc. 40, 550; C. S., s. 2366; Pub. Loc. Ex. Sess. 1924, c. 66; 1931, cc. 50, 194, 446; 1933, cc. 86, 485; 1935, c. 39; 1943, cc. 69, 115, 459; 1951, c. 279; 1953, c. 271; c. 499, s. 2; 1955, c. 93; 1961, c. 25.)

Editor's Note. — The 1951 amendment added Warren to the list of counties.

The first 1953 amendment added Alexander and Lee to the list of counties, and the second 1953 amendment added Alamance.

The 1955 amendment inserted "Forsyth" in the list of counties.

The 1961 amendment inserted "Ashe" in the list of counties.

§ 42-28. Summons issued by justice on verified complaint.

The "oath in writing", etc.—

In accord with original. See *Allen v.*

Allen, 235 N. C. 554, 70 S. E. (2d) 505 (1952).

§ 42-33. Rent and costs tendered by tenant.

Effect of Tender by Tenant.—

Where, in an action in ejectment against a tenant for nonpayment of rent, the answer denies default and pleads tender of the rent, under this section, judgment on the pleadings in plaintiff's favor is

properly denied, and the term not having expired, the tender of rent in arrears before judgment would bar the cause. *Hoover v. Crofts*, 232 N. C. 617, 61 S. E. (2d) 705 (1950).

ARTICLE 4.

Forms.

§ 42-37. Forms sufficient.

Cited in *Massenburg v. Fogg*, 256 N. C. 703, 124 S. E. (2d) 868 (1962).

Chapter 43.

Land Registration.

ARTICLE 1.

Nature of Proceeding.

§ 43-1. Jurisdiction in superior court.

The purpose of a proceeding under the Torrens Law is to remove clouds from title and resolve controversies with regard thereto, not to validate title to lands which under the law of the State, which everyone is presumed to know, are not subject to private ownership. *Swan Island Club v. Yarbrough*, 209 F. (2d) 698 (1954).

Court Has No Jurisdiction to Render Judgment Affecting Title to Lands under Navigable Waters.—In a Torrens proceed-

ing the court is without jurisdiction to render any judgment affecting title to land covered by navigable waters, and with respect to such lands such a decree is a nullity, and subject to collateral attack, although valid with respect to other lands therein embraced. *Swan Island Club v. Yarbrough*, 209 F. (2d) 698 (1954).

Cited in *National Bank of Sanford v. Greensboro Motor Co.*, 264 N.C. 568, 142 S.E.2d 166 (1965).

ARTICLE 3.

Procedure for Registration.

§ 43-6. Who may institute proceedings. — Any person, firm, or corporation, including the State of North Carolina or any political subdivision thereof, being in the peaceable possession of land within the State and claiming an estate of inheritance therein, may prosecute a special proceeding in rem against all the

world in the superior court for the county in which such land is situate, to establish his title thereto, to determine all adverse claims and have the title registered. Any number of the separate parcels of land claimed by the petitioner may be included in the same proceeding, and any one parcel may be established in several parts, each of which shall be clearly and accurately described and registered separately, and the decree therein shall operate directly upon the land and establish and vest an indefeasible title thereto. Any person in like possession of lands within the State, claiming an interest or estate less than the fee therein, may have his title thereto established under the provisions of this chapter, without the registration and transfer features herein provided. (1913, c. 90, s. 4; C. S., s. 2382; 1963, c. 946, s. 1.)

Editor's Note.— The 1963 amendment inserted near the beginning of this section the words "firm, or corporation, including

the State of North Carolina or any political subdivision thereof."

§ 43-11. Hearing and decree.

Contested proceedings for the registration of land titles under the Torrens Law are triable in the mode prescribed by this section under the same rules for proving title as apply in actions of ejectment and

other actions involving the establishment of land titles. *West Virginia Pulp & Paper Co. v. Richmond Cedar Works*, 239 N. C. 627, 80 S. E. (2d) 665 (1954).

ARTICLE 8.

Assurance Fund.

§ 43-49. Assurance fund provided; investment.—Upon the original registration of land and also upon the entry of certificate showing the title as registered owners in heirs or devisees, there shall be paid to the clerk of the court one-tenth of one per cent of the assessed value of the land for taxes, as an assurance fund, which shall be paid over to the State Treasurer, who shall be liable therefor upon his official bond as for other moneys received by him in his official capacity. He shall keep all the principal and interest of such fund invested, except as required for the payment of indemnities, in bonds and securities of the United States, of this State, or of counties and other municipalities within the State. Such investment shall be made upon the advice and concurrence of the Governor and Council of State, and he shall make report of such funds and the investment thereof to the General Assembly biennially. When registration involves the State of North Carolina or any political subdivision thereof, the local tax collector shall assess the value of the land involved as if for tax purposes and the amount to be paid to the clerk shall be an amount equal to one-tenth of one percent (0.1%) of such assessed value; provided, however, that no taxes shall be levied upon such land while title thereto remains in the State of North Carolina or any political subdivision thereof. (1913, c. 90, s. 33; C. S., s. 2422; 1963, c. 946, s. 2.)

Editor's Note. — The 1963 amendment added the last sentence of this section.

Chapter 44.

Liens.

Article 1A.

Wage Liens.

Sec.

44-5.1. Wages for two months' lien on assets.

Article 7.

Liens on Colts, Calves and Pigs.

44-37.1. Further as to lien on colt, calf or pig for service of sire.

Article 8.

Perfecting, Recording, Enforcing and Discharging Liens.

Sec.

44-43. Action to enforce lien; perfection of lien by filing claim with receiver.

Article 12.

Liens on Leaf Tobacco and Peanuts.

44-69.1. Effective period for lien on peanuts.

ARTICLE 1.

Mechanics', Laborers', and Materialmen's Liens.

§ 44-1. On buildings and property, real and personal.

I. GENERAL CONSIDERATION.

Editor's Note.—For note on a husband's power to charge his wife's property with a contractor's or materialman's lien, see 29 N. C. Law Rev. 477. For note on acquisition and priorities of mechanics', laborers' and materialmen's liens, see 29 N. C. Law Rev. 480. For article on mechanics' liens in North Carolina, see 41 N. C. Law Rev. 173.

Historical Background of This and Following Sections. — See Equitable Life Assur. Soc. v. Basnight, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Priority of the Lien.—

A laborers' and materialmen's lien on property takes priority over all the property conveyances to purchasers for value and without notice subsequent to the time when labor and materials are furnished, provided notice of the lien is filed for record within the statutory time, and action to enforce the lien is instituted within the statutory time. Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

The doctrine of relation back is inherent in the very statutes which give the contractor the lien upon the property improved by his labor or materials, and allow him six months after the completion of the labor or the final furnishing of the materials in which to claim it; for it is plain that unless the contractor's lien when filed relates back to the time at which the contractor commenced the performance of the work or the furnishing of the materials, the object of the statutes can be defeated at the will of the owner of the property, by his selling or encum-

bering his estate. Equitable Life Assur. Soc. v. Basnight, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Where a lien claimant files notice of a laborers' and materialmen's lien against a building and the lot on which it stands in the office of the clerk of the superior court in the county in which the property is situate, for work done and materials furnished by him in building and improving the building under contract with the owner of the lot, within six months after the completion of the work and a final furnishing of the material, and commences an action to enforce the lien within six months from the date of filing the notice of the lien in the county where the lot is situate, the lien relates back to the time when the lien claimant began the performance of the work and the furnishing of the materials, and takes precedence by reason of such relationship back over an intervening recorded deed of trust made by the owner of the lot since then, or other liens created by the owner since then. Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Inchoate and Perfected Lien. — This section gives a contractor an inchoate lien upon a building and the lot on which it is situated for work done and materials furnished by him in constructing, improving, or repairing such building pursuant to a contract with the owner. When the contractor perfects such inchoate lien in compliance with the requirements of article 8 of this chapter, the resulting judgment creates this twofold lien: (1) A special lien on the building and the lot

upon which it is situated; and (2) a general lien on the other real property of the owner in the county where the judgment is docketed. *Nat. Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Priority of Purchase Money Deed of Trust over Material Lien. — A purchase money deed of trust stands upon the same footing as a purchase money mortgage, and its lien is superior to the lien for material which was begun to be furnished the purchaser while he was in possession under a lease with option to purchase, since no lien against the purchaser could attach prior to the lien of the deed of trust, the execution of the deed of trust being regarded as but one transaction. *Smith Builders Supply v. Rivenbark*, 231 N. C. 213, 56 S. E. (2d) 431 (1949).

Estoppel.—

Where plaintiff alleges a contractual relationship with the defendants in both the lien notice and the complaint, and seeks to enforce the alleged lien pursuant to the provisions of this section, he is estopped from asserting any lien as a subcontractor pursuant to the provisions of §§ 44-6, 44-8, and 44-9. *Ranlo Supply Co. v. Clark*, 247 N. C. 762, 102 S. E. (2d) 257 (1958).

Cited in *Cline Paving Co. v. Southland Speedways, Inc.*, 250 N. C. 358, 108 S. E. (2d) 641 (1959); *United States v. Durham Lumber Co.*, 257 F. (2d) 570 (1958), affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960); *Williams v. Denning*, 260 N.C. 539, 133 S.E.2d 150 (1963).

II. MATERIAL AND SERVICES CONTRACTED.

The existence of a debt arising out of contract, etc.—

In accord with original. See *Eason v. Dew*, 244 N. C. 571, 94 S. E. (2d) 603 (1956).

§ 44-2. On personal property repaired. — Any mechanic or artisan who makes, alters or repairs any article of personal property at the request of the owner or legal possessor of such property has a lien on such property so made, altered or repaired for his just and reasonable charge for his work done and material furnished, and may hold and retain possession of the same until such just and reasonable charges are paid; and if not paid for within thirty days, if it does not exceed fifty dollars, or within ninety days if over fifty dollars, after the work was done, such mechanic or artisan may proceed to sell the property so made, altered or repaired at public auction, after first publishing a notice of the time and place of said sale once in each of two successive weeks in a newspaper published in the county in which the work may have been done; provided, however, the last publication shall be within seven days prior to the date of sale, or if there is no such newspaper, then by posting up notice of such sale in three of the most public places in the county, town or city in which the work was done, and the proceeds of the said sale shall be applied first to the discharge of

A laborers' and materialmen's lien arises out of the relationship of debtor and creditor, and it is for the debt that the lien is created by statute. Without a contract the lien does not exist. Mere knowledge that work is being done or material furnished does not enable the person furnishing the labor or material to obtain a lien. *General Air Conditioning Co. v. Douglass*, 241 N. C. 170, 84 S. E. (2d) 828 (1954).

VI. WAIVER OF LIEN, HOME-STEAD, AND MISCELLANEOUS MATTERS.

Lien Lost if Not Perfected. — A contractor's lien on real property is inchoate until perfected by compliance with legal requirements, and is lost if the steps required for its perfection are not taken in the manner and within the time prescribed by law. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Mechanic or Materialman Must Apply Payment as Intended If He Knows Source and Purpose. — The general rule as to application of payments is subject to the qualification that where money is paid by a contractor or the seller of property to a mechanic or materialman out of funds received by the contractor or seller of property from an owner or purchaser whose property is subject to a mechanics' or materialmen's lien, or both, and the purpose of the payment to the contractor or seller was to discharge the indebtedness against a specific house, the mechanic or materialman must apply the payment to discharge the indebtedness if he had knowledge of the source and purpose of the payment. *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

the said lien and the expenses and costs of keeping and selling such property, and the remainder, if any, shall be paid over to the owner thereof.

Provided, that in selling any motor vehicle under the provisions of this section, a twenty day notice in advance of such sale shall be given the Commissioner of Motor Vehicles. (1869-70, c. 206, s. 3; Code, s. 1783; Rev., s. 2017; C. S., s. 2435; 1945, c. 224; 1961, c. 282.)

Editor's Note.—

The 1961 amendment, effective July 1, 1961, made changes with regard to giving public notice.

This section simply affirms the common-law lien given to artisans who have altered or repaired articles of personal property and are in possession of same, with the superadded right of foreclosure by sale in order to make the lien effective. *Johnson v. Yates*, 183 N. C. 24, 110 S. E. 603 (1922); *Barbre-Askew Finance, Inc. v. Thompson*, 247 N. C. 143, 100 S. E. (2d) 381 (1957).

Lien Arises Not by Contract but by Implication of Law.—A common-law possessory lien, to which this section relates, arises by implication of law, not by contract. *Barbre-Askew Finance, Inc. v. Thompson*, 247 N. C. 143, 100 S. E. (2d) 381 (1957), holding that even though there was an entire and indivisible contract for repairs in the instant case, it had no bearing on the loss of possessory lien arising by operation of law.

To Whom Section Applies—Mortgagor in Possession with Consent of Mortgagee.—A mortgagor, in possession of an automobile with the consent of the mortgagee, is "the owner or legal possessor" thereof within the meaning of this section and has implied authority from the mortgagee to contract for repairs; when authorized by such mortgagor, the mechanic who makes such repairs has a lien on the automobile and may retain possession thereof until his just and reasonable charges are paid; and if he preserves his lien thereon by retaining possession of the automobile, the mechanic's lien is superior to the lien of a duly recorded prior mortgage on the automobile. *Barbre-Askew Finance, Inc.*

v. *Thompson*, 247 N. C. 143, 100 S. E. (2d) 381 (1957).

Retention of Possession Essential.—

Since the lien referred to and affirmed in this section is the common-law possessory lien, it is indispensable that the party claiming it have an independent and exclusive possession of the property. The moment that possession is voluntarily surrendered, the lien is gone. Nothing else appearing, even as between the mechanic and the owner of the chattel, the lien is lost if and when the mechanic voluntarily and unconditionally surrenders possession to the owner. *Barbre-Askew Finance, Inc. v. Thompson*, 247 N. C. 143, 100 S. E. (2d) 381 (1957).

Where possession of an automobile was relinquished by a mechanic under an agreement that the owner would return it for completion of repairs, the common-law possessory lien of the mechanic set out in this section was lost and could not be revived upon reacquisition by the mechanic. *Barbre-Askew Finance, Inc. v. Thompson*, 247 N. C. 143, 100 S. E. (2d) 381 (1957).

Compliance with § 44-38 et seq. Not Required.—Where an asserted lien is created and exists solely by statute, it must be perfected ordinarily in the manner prescribed by § 44-38 et seq. But this section "is a self-executing enactment"; hence, compliance with § 44-38 et seq. is not required to perfect the lien referred to therein. *Barbre-Askew Finance, Inc. v. Thompson*, 247 N. C. 143, 100 S. E. (2d) 381 (1957).

Cited in *Dillingham v. Blue Ridge Motors*, 234 N. C. 171, 66 S. E. (2d) 641 (1951); *Rick v. Murphy*, 251 N. C. 162, 110 S. E. (2d) 815 (1959).

ARTICLE 1A.

Wage Liens.

§ 44-5.1. Wages for two months' lien on assets.—In case of the insolvency of a corporation, partnership or individual, all persons doing labor or service of whatever character in its regular employment have a lien upon the assets thereof for the amount of wages due to them for all labor, work, and services rendered within two months next preceding the date when proceedings in insolvency were actually instituted and begun against the corporation, partnership or individual, which lien is prior to all other liens that can be acquired against such assets: Provided, that the lien created by this section shall not apply to mul-

tiple unit dwellings, apartment houses, or other buildings for family occupancy except as to labor performed on the premises upon which the lien is claimed. This section shall not apply to any single unit family dwelling. (1901, c. 2, s. 87; Rev., s. 1206; C. S., s. 1197; 1937, c. 223; 1943, c. 501; 1955, c. 1345, s. 4.)

Editor's Note. — The 1937 amendment inserted the words "partnership or individual" twice in this section. Before this amendment it had been held that the section did not apply to the employee of an insolvent individual but only to the employee of an insolvent corporation. See *In re Reade*, 206 N. C. 331, 173 S. E. 342 (1934).

The 1943 amendment inserted the proviso.

The 1955 amendment transferred this section from § 55-136. The annotations below were derived from cases decided prior to the transfer of the section.

Section Gives Ancillary Remedy. — This section, giving to laborers of insolvent corporations a specific lien upon the assets of the company for two months' wages at least, was not intended to militate against rights that they might otherwise have under the existing law for debts due them, but gives them a special lien for certain wages. *Union Trust Co. v. Southern Sawmills & Lumber Co.*, 166 Fed. 193 (1908).

What Creditors Favored. — The creditors favored by this section are laborers and workmen and all persons doing labor or service of whatever character in the regular employment of certain corporations. *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N.C. 512, 86 S.E. 184 (1915).

Contractor Not Included. — A contractor, furnishing his own teams, labor, etc., in hauling materials for the building of a bridge by a corporation, within the two months next preceding the date of the institution of proceedings in insolvency, is not engaged in doing labor or performing "service of whatever character" within the meaning of this section. *Phoenix Iron Co. v. Roanoke Bridge Co.*, 169 N.C. 512, 86 S.E. 184 (1915).

Agent Having Authority to Deduct Salary from Collections. — Under this section an agent with authority to make collections and to deduct his salary and expenses from the sums collected, has no lien for claims for salary earned and expenses incurred before his appointment to the position and more than two months before the appointment of a receiver. *Cummer Lumber Co. v. Seminole Phosphate Co.*, 189 N.C. 206, 126 S.E. 511 (1925).

Claim Based on Contract for Single

Piece of Work. — The claim of an independent company which repaired machinery belonging to the insolvent partnership on a single occasion at a contract price fixed by mutual agreement could not constitute a preferred claim under this section, since the claim was for the unpaid contract price—not wages. Moreover, the claim was based on a single piece of work, the company was not hired to do permanent or steady work in the usual course of the occupation of another, and, this being true, it did not render the service in the regular employment of another. *National Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

Severance Pay Not Wages Earned. — Employees under a contract providing for severance pay are not entitled to a lien for such pay against the receiver, since severance pay is not wages earned. *In re Port Publishing Co.*, 231 N. C. 395, 57 S. E. (2d) 366, 14 A. L. R. (2d) 842 (1950).

Prior Lien Holders Protected. — Property acquired by a private corporation subject to a valid and registered mortgage does not become an asset of the corporation except as subject to the prior lien; and the lien given to laborers on the assets of an insolvent corporation for work done under the conditions stated in this section cannot affect the vested rights obtained by the prior lien holders. *Roberts v. Bowen Mfg. Co.*, 169 N.C. 27, 85 S.E. 45 (1915).

But Not One Taking Mortgage on Corporate Property. — One who takes a mortgage upon corporation property for money loaned to operate it or to secure other debts does so with the knowledge that the lien of his mortgage is subject to be displaced in favor of laborers' liens in case of insolvency. *Humphrey Bros. v. Buell-Crocker Lumber Co.*, 174 N.C. 514, 91 S.E. 971 (1917).

Lien against Receiver. — Employees under a contract providing for paid vacations have a lien against the receiver of the employer for 1/6 of their vacation pay, since this amount was earned during the two months next preceding the institution of insolvency proceedings. *In re Port Publishing Co.*, 231 N. C. 395, 57 S. E. (2d) 366, 14 A. L. R. (2d) 842 (1950).

Service after Receivership. — Claims of laborers for wages due them for work done for the receiver of an insolvent partnership during the receivership cannot qualify for

a preferred status under this section. National Surety Corp. v. Sharpe, 236 N. C. 35, 72 S. E. (2d) 109 (1952).

This section does not apply to any wages except those due "for labor, work, and services rendered within," i. e., inside the limits of, "two months next preceding the date when proceedings in insolvency were actually instituted and begun." National Surety Corp. v. Sharpe, 236 N. C. 35, 57, 72 S. E. (2d) 109 (1952), wherein the court said: "We cannot accept as valid the suggestion contained in Walker v. Linden Lumber Co., 170 N. C. 460, 87 S. E. 331 (1915), that the word 'within' means 'subsequent,' and that the statute, therefore, gives laborers 'a first lien' for all their wages accruing 'after 60 days prior to the insolvency,' notwithstanding the supervening receivership."

The lien of the employees arises upon the sequestration of the property of the insolvent for the purpose of liquidation, or rather the institution of a proceeding for that purpose. The lien does not exist so long as the property remains in the hands of the insolvent. It arises when the property is taken in custodia legis for the purpose of distribution among the creditors. Leggett v. Southeastern People's College,

234 N. C. 595, 68 S. E. (2d) 263 (1951), commented on in 30 N. C. Law Rev. 442.

Priority of Claims of Federal Government.—While this section creates what is denominated a lien, it, in practical effect, grants to the employees of the insolvent a right of payment of the designated wages prior to the payment of any other claim, secured or unsecured. This preference is subordinate to the right of the United States under the provisions of 31 U. S. C. A. sec. 191, giving priority to debts due the United States. Leggett v. Southeastern People's College, 234 N. C. 595, 68 S. E. (2d) 263 (1951), commented on in 3 N. C. Law Rev. 442.

The lien of the employees under this section is not specific or preferred in the sense necessary to give it precedence over the claim of the federal government for taxes under the provisions of 26 U. S. C. A. sec. 3672. Leggett v. Southeastern People's College, 234 N. C. 595, 68 S. E. (2d) 263 (1951), commented on in 30 N. C. Law Rev. 442.

Notice Need Not Be Filed.—Under this section the laborer is not required to file a notice of his claim. Walker v. Linden Lumber Co., 170 N.C. 460, 87 S.E. 331 (1915).

ARTICLE 2.

Subcontractors', etc., Liens and Rights against Owners.

§ 44-6. Lien given subcontractors, etc., on real estate.

Editor's Note.—For note on subcontractors' liens, see 30 N. C. Law Rev. 83.

Subcontractor Substituted to the Rights of Contractor.—

Where the lien arises under the provisions of this section it does so by substituting the claimant to the rights of the contractor limited as therein stated. Widenhouse v. Russ, 234 N. C. 382, 67 S. E. (2d) 287 (1951); Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co., Inc., 259 N. C. 649, 131 S. E. (2d) 487 (1963).

Defenses of Owner.—While there is no privity of contract between the subcontractor and the owner, the rights of a subcontractor to a lien arises under this section substituting it to the rights of the contractor as against the owner, and therefore in a subcontractor's suit to enforce its lien the owner may set up as defenses the failure of the principal contractor to construct the building in accordance with the contract and the failure of the subcontractor to perform its contract with the principal contractor, and may contest the balance, if any, due the subcontractor

on its contract with the principal contractor. Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co., Inc., 259 N. C. 649, 131 S. E. (2d) 487 (1963).

Elements Essential to Recovery.—

In order for a subcontractor to recover against the owner, the subcontractor must show its subcontract with the contractor, material furnished and labor performed in substantial fulfillment thereof, a balance due it, notice to the owner prior to payment of the contract price by the owner to the principal contractor, and a balance due the principal contractor by the owner. Michael Flynn Mfg. Co. v. J. L. Coe Constr. Co., Inc., 259 N. C. 649, 131 S. E. (2d) 487 (1963).

Lien of Subcontractor Is Preferred to That of General Contractor.—This section expressly created a lien for the protection of subcontractors which is preferred to that arising in favor of the general contractor. United States v. Durham Lumber Co., 257 F. (2d) 570 (1958), affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960).

The lien is enforceable to the extent of the amount due from the owner to the contractor. *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E. (2d) 287 (1951).

Determination of Amount Due to Contractor.—It is material to ascertain and determine what amount, if any, was due by the owner to the contractor at the time of notices given. *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E. (2d) 287 (1951).

For the purpose of ascertaining the amount due by the owner to the contractor at the time of notice given to the owner by a subcontractor or materialman, the owner may, in a suit by such subcontractor or materialman, set up, as a defense, any actual damages caused by the failure of the contractor to complete the building in accordance with the terms of the contract. *Widenhouse v. Russ*, 234 N.C. 382, 67 S.E. (2d) 287 (1951).

Seizure by the United States under a tax lien of the claim of the general con-

tractor cannot extinguish the statutory rights and obligations of a subcontractor and a North Carolina owner as between each other. *United States v. Durham Lumber Co.*, 257 F. (2d) 570 (1958), affirmed in 363 U.S. 522, 80 S.Ct. 1282, 1285, 4 L.Ed. (2d) 1371 (1960).

Estoppel to Assert Lien under This Section.—Where plaintiff alleges a contractual relationship with the defendants in both the lien notice and in the complaint, and seeks to enforce its alleged lien pursuant to the provisions of this section, he is estopped from asserting any lien as a subcontractor pursuant to the provisions of this section and §§ 44-8, and 44-9. *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E. (2d) 257 (1958).

Cited in *Caudle v. Southern Ry. Co.*, 242 N.C. 466, 88 S.E. (2d) 138 (1955); *Love v. Snellings*, 246 N.C. 674, 100 S.E. (2d) 65 (1957).

§ 44-8. Statement of contractor's indebtedness to be furnished to owner; effect.

Section Is Directed against Contractor.

—This section and § 44-12 are directed against, not the owner, but the contractor. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Purpose of Section, etc.—

In accord with original. See *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Elements Essential to Recovery.—See same catchline in note to § 44-6.

Statement Required Before General Contractor Receives Any Payment from Owner.—The general contractor, before receiving any payment from the owner, is required by this section to file with the owner a statement of all sums due subcontractors, and the owner is directed to pay such sums directly to the subcontractors rather than to the general contractor. *United States v. Durham Lumber Co.*, 257 F. (2d) 570 (1958), affirmed in 363 U.S. 522, 80 S.Ct. 1282, 1285, 4 L.Ed. (2d) 1371 (1960).

Sufficiency of Notice.—The notice or itemized statement required by this section and § 44-9 must be filed in detail specifying the material furnished or labor performed and the time thereof. It must

further show the amount due and unpaid so as to put the owner on notice that such amount is demanded. Neither invoices furnished under the contract nor statements made by the contractor to enable him to procure what is due, nor mere knowledge of the owner of the existence of the debt is sufficient to charge him with liability. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Burden Is on Materialman to Prove Notice Given.—While it is true that when a contractor furnishes a list of laborers and materialmen to whom he is indebted, the owner must retain a sufficient part of the contract price to satisfy such claims, the burden is on a person furnishing materials to the contractor to show that such notice was so given by the contractor or that the owner was notified directly by him. There is no lien until and unless the statutory notice, either under this section or under § 44-9, has been given. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Cited in *Caudle v. Southern Ry. Co.*, 242 N.C. 466, 88 S.E. (2d) 138 (1955); *Ranlo Supply Co. v. Clark*, 247 N.C. 762, 102 S.E. (2d) 257 (1958).

§ 44-9. Subcontractors, laborers and materialmen may notify owner of claim; effect.

Cross Reference.—See note to § 44-12.

Elements Essential to Recovery.—See same catchline in note to § 44-6.

Rights of Subcontractor and Obligation of Owner Generally.—It is clear that under the North Carolina statutes the

subcontractor who notifies the owner of his claim has (1) a lien upon the improved real estate superior to any lien which the general contractor may obtain, and (2) an independent cause of action, against the owner, maintainable in his own name and in his own right, without regard to the time limitations upon the commencement of suit to enforce a lien, and the owner, after notice, may not avoid or reduce his direct liability to the subcontractor by any payment to, or settlement with, the general contractor. In any settlement with the general contractor, the owner may take credit for payments made by him to subcontractors, and he is required by statute to withhold sufficient funds to pay all of the claims of subcontractors of which he has notice. The obligation of the owner to the subcontractor is, thus, primary; his obligation to the general contractor, secondary. *United States v. Durham Lumber Co.*

§ 44-10. Sums due by statement

Elements Essential to Recovery.—See same catchline in note to § 44-6.

Cited in *United States v. Durham Lum-*

ber Co.

Sufficiency of Notice.—See same catchline in note to § 44-8.

Burden Is on Materialman to Prove Notice Given.—See same catchline in note to § 44-8.

Right to Prove Notice or Waiver by Testimony of Owners' Attorney.—Where property owners constituted an attorney their agent to distribute among subcontractors the amount remaining due for the construction of a dwelling, plaintiff subcontractor had the right to show by the attorney that plaintiff's claim was filed or that the filing was waived, there being nothing to indicate that any confidential communication was involved. *Goldston v. Randolph Machine Tool Co.*, 245 N. C. 226, 95 S. E. (2d) 455 (1956).

Cited in *Ranlo Supply Co. v. Clark*, 247 N. C. 762, 102 S. E. (2d) 257 (1958).

to constitute lien.

ber Co., 257 F. (2d) 570 (1958) affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960).

§ 44-11. Where sums due contractor from owner insufficient; payment pro rata.

Cited in *United States v. Durham Co.*, 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960); Michael Flynn Mfg.

Co. v. J. L. Coe Constr. Co., Inc., 259 N. C. 649, 131 S. E. (2d) 487 (1963).

§ 44-12. Contractor failing to furnish statement, or not applying owner's payments to laborer's claims, misdemeanor.

Section Is Directed against Contractor.—This section and § 44-8 are directed against, not the owner of the property but the contractor. The purpose is to compel the latter to supply the itemized statement, so that the laborer may be benefited, have his right facilitated, and the owner of the property may be reasonably protected. *Oldham & Worth, Inc. v. Bratton*, 263 N.C. 307, 139 S.E.2d 653 (1965).

Owner Cannot Compel Contractor to Furnish Statement.—There is no liability created on the part of the owner of the property if the itemized statement is not supplied to him; he cannot compel the contractor to furnish him with it, nor is he presumed to know that the contractor has not paid the laborer or mechanic or that he owes him any particular sum. *Oldham*

& Worth, Inc. v. Bratton, 263 N.C. 307, 139 S.E.2d 653 (1965).

Subcontractor May Furnish Statement if Contractor Does Not.—A contractor who fails to furnish under this section a statement of all sums due subcontractors is guilty of a misdemeanor, but, whether he does or not, a subcontractor may furnish the owner with a statement of his account. If he does so, a lien immediately arises in his favor under § 44-9, and thereafter no "payment to the contractor shall be a credit on or a discharge of the lien * * *." *United States v. Durham Lumber Co.*, 257 F. (2d) 570 (1958), affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960).

Applied in *State v. Griffin*, 246 N. C. 680, 100 S. E. (2d) 49 (1957).

§ 44-14. Contractor on municipal building to give bond; action on bond.

I. GENERAL CONSIDERATION.

Section Prescribes Procedure to Be Followed by Claimant-Beneficiary.—When a

claimant-beneficiary under this statutory provision brings his action, the procedure to be followed to enforce payment of a sum

not to exceed the penal sum of the bond and distribution of this sum among claimants, is that prescribed by this section. American Bridge Division United States Steel Corp. v. Brinkley, 255 N. C. 162, 120 S. E. (2d) 529 (1961).

And Contemplates Notice Which Informs. — This section contemplates notice which informs, not a notice which misinforms. American Bridge Division United States Steel Corp. v. Brinkley, 255 N. C. 162, 120 S. E. (2d) 529 (1961).

Notice Erroneously Stating Time Limit for Intervention. — Where, in a creditor's action against the contractor and the surety on his bond to recover for labor and materials furnished and used in public construction, the notice of the pendency of the suit erroneously states the time limit for intervention by the other claimants, such notice does not meet the requirements of the statute, and a claimant who has given notice of his claim to the contractor and

the surety within six months of the completion of the contract may not be precluded from intervening and joining in the recovery against the bond. American Bridge Division United States Steel Corp. v. Brinkley, 255 N. C. 162, 120 S. E. (2d) 529 (1961).

II. PROTECTION AFFORDED BY BOND.

This section was intended, etc.—

The General Assembly has, by the enactment of this section and § 136-28, given to laborers and materialmen engaged in public construction a substantial equivalent to the lien given laborers and materialmen engaged in private construction. The surety on the bond is, for practical purposes, the substitute for the lien. American Bridge Division United States Steel Corp. v. Brinkley, 255 N. C. 162, 120 S. E. (2d) 529 (1961).

ARTICLE 4.

Warehouse Storage Liens.

§ 44-28. Liens on goods stored for charges. — Every person, firm or corporation who furnishes storage room for furniture, tobacco, goods, wares or merchandise and makes a charge for storing the same, has the right to retain possession of and a lien upon all furniture, tobacco, goods, wares or merchandise until such storage charges are paid. Provided, however, where the holder of a security interest with respect to the property stored, or any part thereof, has instituted appropriate legal proceedings for the recovery of possession of the property, such holder shall be entitled to possession under the writ or other process upon payment of a fair fractional portion of the total storage charges reasonably allocable to the storage of the property described in the writ or other process. (1913, c. 192, s. 1; 1915, c. 190, s. 1; C. S., s. 2459; 1965, c. 1057.)

Editor's Note. — The 1965 amendment added the second sentence.

ARTICLE 7.

Liens on Colts, Calves and Pigs.

§ 44-37.1. Further as to lien on colt, calf or pig for service of sire. — The owner of any stallion, jack, bull, boar, or semen therefrom, shall have a lien upon any colt, calf or pig begotten by such animal or by means of artificial insemination with such semen, for the price stipulated to be paid for such service. Such lien shall continue in force until the service price is paid.

The colt, calf or pig shall not be exempt from execution for the payment of the service price by reason of the operation of the personal property exemption, provided the person claiming such lien institutes action to enforce the lien within twelve (12) months from the birth of such offspring. (1957, c. 787.)

ARTICLE 8.

Perfecting, Recording, Enforcing and Discharging Liens.

§ 44-38. Claim of lien to be filed; place of filing.

Cross Reference. —

As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

Compliance with Section Necessary to Perfect Lien.—See Equitable Life Assur. Soc. v. Basnight, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Compliance with Section Not Required to Perfect Lien under § 44-2.—See note to § 44-2.

"Filing" Imports More than Mere Delivery to Clerk's Office.—The filing of a lien for labor or materials imports more than mere delivery of the written claim to the clerk's office, and requires the transcribing of the notice of lien in the lien docket in the clerk's office and the indexing of same in the name of the claimant (G. S. 2-42) but, as distinguished from liens required by statute to be registered in the office of the register of deeds (G. S. 161-22) does not require cross-indexing. Saunders v. Woodhouse, 243 N. C. 608, 91 S. E. (2d) 701 (1956).

Particularity Required, etc.—

This section does not require a listing of material item by item, or the labor hour by hour. Yet it demands more than a mere summary statement. It requires a statement in sufficient detail to put parties who are or may become interested in the premises on notice as to the labor performed and material furnished, the time when the labor was performed and the material was furnished, the amount due therefor, and the property upon which it was employed. Lowery v. Haithcock, 239 N. C. 67, 79 S. E. (2d) 204 (1953).

The provisions of this section and § 44-39 are not binding on an admiralty court in a proceeding to establish a lien for labor and materials furnished in the repair of a vessel, but the limitations which they prescribe can be considered by the admiralty court in applying the doctrine of laches. Phelps v. The Cecelia Ann, 199 F. (2d) 627 (1952).

While state statutory provisions of limitation do not bind a federal court in admiralty proceedings, it is proper to con-

sider them in applying the principle of laches. Thus a proceeding to enforce a maritime lien for supplies and materials furnished to a vessel and its owner was barred by laches, in view of this section and § 44-39 where the libel was not instituted until twenty-one months after the claim became due. Davis v. The Nola Dare, 157 F. Supp. 420 (1957).

Instances of Sufficiency.—

In accord with 2nd paragraph in original. See Lowery v. Haithcock, 239 N. C. 67, 79 S. E. (2d) 204 (1953).

A lien for material and labor was properly filed where the clerk after delivery attached it in its original form to specified page in a book labeled "Lien Docket" where the book without question was the book intended as the lien docket contemplated by § 2-42, though the book was also used for the filing of liens for old age assistance, since § 108-30.1 provides that such liens shall be filed in the regular lien docket. Saunders v. Woodhouse, 243 N. C. 608, 91 S. E. (2d) 701 (1956).

Stipulation that notice was filed with defendant landlord does not comply with this section requiring notice to be filed in the office of the superior court clerk. Eason v. Dew, 244 N. C. 571, 94 S. E. (2d) 603 (1956).

Contract Negotiated by Husband for Drilling of Well on Wife's Property.—See Lowery v. Haithcock, 239 N. C. 67, 79 S. E. (2d) 204 (1953).

Applied in Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Cited in United States v. Durham Lumber Co., 257 F. (2d) 570 (1958), affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960); Priddy v. Kernersville Lumber Co., Inc., 258 N. C. 653, 129 S. E. (2d) 256 (1963); McDonough Constr. Co. v. Hanner, 232 F. Supp. 887 (M.D.N.C. 1964).

§ 44-38.1. Liens on personal property created in another state.—
(a) For the purposes of this section, personal property acquires a situs in this State when it is brought into this State with the intent that it be permanently located in the State. The keeping of personal property in this State for two consecutive months is *prima facie* evidence that such property has acquired a situs in this State.

(b) When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State from another and acquires a situs in this State, such encumbrance is valid prior to registration in this State as against then creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only upon fulfilling all of the following conditions:

(1) That such encumbrance was properly registered in the state where such property was located prior to its being brought into this State; and

(2) That such encumbrance is properly registered in this State within ten days after the mortgagee, grantee in a deed of trust, or conditional sale vendor has knowledge that the encumbered property has been brought into this State; and

(3) That such registration in this State in any event takes place within four months after encumbered property has been brought into this State.

(c) When personal property covered by a deed of trust, mortgage or conditional sale contract is brought into this State and no situs is acquired in this State, the encumbrance is valid as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only from the date of due registration of such encumbrance in the proper office in the state from which the property was brought.

(d) When encumbered personal property is brought into this State from a state where the encumbrance is not required to be registered, such encumbrance is valid as against lien creditors of, or purchasers for valuable consideration from, the grantor, mortgagor or conditional sale vendee only from the time of registration of such encumbrance in this State pursuant to G. S. 47-20.

(e) Nothing herein modifies any of the provisions of Article 1 of Chapter 44 of the General Statutes. (1949, c. 1129; 1951, c. 251; 1953, c. 675, s. 30.)

Editor's Note.—The 1951 amendment rewrote this section.

The 1953 amendment substituted "the state" for "this State" in line one of paragraph (1) of subsection (b).

The cases cited under this section dealing with motor vehicles were decided prior to the enactment of the present provisions as to the perfection of security interests in vehicles requiring certificates of title. See §§ 20-58 to 20-58.10.

For brief comment on 1951 amendment, see 29 N. C. Law Rev. 410.

Section Modifies Common Law.—This section, in respect to conditional sales contracts, modifies the rule of the common law. Franklin Nat. Bank v. Ramsey, 252 N. C. 339, 113 S. E. (2d) 723 (1960).

And General Rule of Comity.—The provisions of this section modify and supersede the general rule of comity. Franklin Nat. Bank v. Ramsey, 252 N. C. 339, 113 S. E. (2d) 723 (1960).

Purpose of Section.—This section was enacted to protect persons in this State who purchase for a valuable consideration personal property, covered by a chattel mortgage or a conditional sale agreement created in another state, when the property has been brought into this State from another state. Home Finance Co. v. O'Daniel, 237 N. C. 286, 74 S. E. (2d) 717 (1953).

The legislature enacted this section to afford purchasers of personal property in this State protection against liens created in some other state. Central Nat. Bank of Richmond, Virginia v. Rich, 256 N. C. 324, 123 S. E. (2d) 811 (1962).

Application of Subsections (a), (b) and (c).—Subsection (b) applies to property if a situs has been acquired; subsection (c) applies if the property has acquired no situs. Home Finance Co. v. O'Daniel, 237 N. C. 286, 74 S. E. (2d) 717 (1953).

If the automobile does not acquire a situs in this State within the meaning of subsections (a) and (b) of this section, subsection (c) applies. Franklin Nat. Bank v. Ramsey, 252 N. C. 339, 113 S. E. (2d) 723 (1960).

If the automobile acquires a situs in this State within the meaning of subsections (a) and (b) of this section, a conditional sale contract will be valid as against a purchaser for a valuable consideration from the conditional sale vendee, only upon fulfilling all of the conditions of subsection (b). Franklin Nat. Bank v. Ramsey, 252 N. C. 339, 113 S. E. (2d) 723 (1960).

Prima Facie Evidence of Acquisition of Situs.—The intent contemplated by subsection (a) is often difficult, if not impossible, to establish so as to make out a case for the jury. In order to facilitate the making out of a case for the jury, the second sentence of subsection (a) was enacted. Home Finance Co. v. O'Daniel, 237 N. C. 286, 74 S. E. (2d) 717 (1953).

The prima facie evidence referred to in subsection (a) means, and means no more than, evidence sufficient to justify, but not to compel, an inference that the property has acquired a situs in North Carolina if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted, by the jury. It simply carries the case to the jury for determination, and no

more. *Home Finance Co. v. O'Daniel*, 237 N. C. 286, 74 S. E. (2d) 717 (1953).

Registration in Other State after Vehicle Brought into This State. — Where a conditional sale contract is not registered in the state in which the conditional sale was made until after the vehicle had been brought into this State, a bona fide purchaser without notice from the conditional

§ 44-39. Time of filing notice.

Cross Reference.—As to effect of this section in proceedings in admiralty court, see note to § 44-38. As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

Compliance with Section Necessary to Perfect Lien.—See *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

The lien is lost if the steps required to perfect it are not taken in the manner and within the time prescribed by law. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 256 (1963).

Time Runs from Furnishing of Last Item of Work or Materials.—The time for filing a claim in a mechanic's lien proceeding is computed from the date when the last item of work, labor or materials is done, performed or furnished. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 256 (1963).

But the work performed and materials furnished must be required by the contract, and whatever is done must be done in good faith for the purpose of fully performing the obligations of such contract, and not for the mere purpose of extending the time for filing lien proceedings. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 256 (1963).

And Must Be Performed or Furnished under One Continuous Contract.—In order that the date of the last item be taken as that from which limitation for filing notice of lien shall run, it is essential that the work or materials at different times be furnished under one continuous contract. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 256 (1963).

§ 44-40. Date of filing fixes priority.

Cited in *United States v. Durham Lumber Co.*, 257 F. (2d) 570 (1958), affirmed

sale vendee acquires title free from the lien of the conditional sale contract, irrespective of whether the vehicle acquired a situs here. *Franklin Nat. Bank v. Ramsey*, 252 N. C. 339, 113 S. E. (2d) 723 (1960).

Cited in *Friendly Finance Corp. v. Quinn*, 232 N. C. 407, 61 S. E. (2d) 192 (1950); *Handley Motor Co. v. Wood*, 237 N. C. 318, 75 S. E. (2d) 312 (1953).

Claimant Cannot Extend Time by Furnishing Additional Items for that Purpose.—Where the time allowed for filing a lien has begun to run, the claimant cannot thereafter extend the time within which the lien may be filed by doing or furnishing small additional items for that purpose. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 562 (1963).

Good Faith in Furnishing Additional Materials a Question of Fact.—Whether the materials furnished after the contract had been substantially completed were in good faith and for the purpose of completing the contract or colorably to revive the lien is a question of fact. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 256 (1963).

Attempts to Extend Lien Held to Constitute Constructive Fraud.—Where the evidence established that the purpose of a disputed sale was to extend the defendant's time for filing its lien, and the defendant acted under a mistake of law, its attempts to extend the lien constituted legal or constructive fraud which may exist without any fraudulent intent. *Priddy v. Kernersville Lumber Co., Inc.*, 258 N. C. 653, 129 S. E. (2d) 256 (1963).

Applied in *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

Cited in *Eason v. Dew*, 244 N. C. 571, 94 S. E. (2d) 603 (1956); *United States v. Durham Lumber Co.*, 257 F. (2d) 570 (1958), affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285, 4 L. Ed. (2d) 1371 (1960).

§ 44-41. Laborer's crop lien dates from work begun.

Quoted in *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

§ 44-43. Action to enforce lien; perfection of lien by filing claim with receiver.—Action to enforce the lien created must be commenced in the court of a justice of the peace, and in the superior court, according to the jurisdiction thereof, within six months from the date of filing the notice of the lien. But if the debt is not due within six months, but becomes due within twelve months, suit may be brought or other proceedings instituted to enforce the lien in thirty days after it is due. Provided, when the assets of the debtor against whom the lien was created are in the hands of a duly appointed receiver, the lien may be perfected by the filing of a claim with the receiver within the times described above, without the necessity of bringing action. (1868-9, c. 117, s. 7; 1869-70, c. 206, s. 5; 1876-7, cc. 250, 251; Code, ss. 1785, 1790; Rev., s. 2027; C. S., s. 2474; 1961, c. 972.)

Editor's Note.—The 1961 amendment, effective July 1, 1961, added the last sentence.

Compliance with Section Necessary to Perfect Lien.—See *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

What Interest Subject to Sale.—An action to enforce a contractor's lien is designed to enforce the lien by the sale of whatever interest the person who caused the building to be erected or repaired had in the land improved by the labor or materials of the contractor at the time the lien attached. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

This section does not undertake to specify who shall be made parties to the action to enforce the contractor's lien, which it requires to be brought within the period of six months designated by it. The solution of this problem is, therefore, to be found in the nature and object of the action to enforce the lien. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Landowner Who Contracted for Debt Is Necessary Party.—Since the judgment in the action will directly affect his interest in the real property involved in the suit, the landowner who contracted the debt for which the lien is claimed is certainly a necessary party to the action to enforce the lien. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Subsequent Encumbrancers and Adverse Claimants Are Proper, but Not Necessary, Parties.—The contractor can obtain the complete relief sought, i. e., the sale of the interest owned by the person who caused the improvement to be made at the time the lien attached in his action against the landowner, without having the rights of adverse claimants ascertained and set-

tled. In consequence, subsequent encumbrancers and other adverse claimants are not necessary parties to an action to enforce a contractor's lien. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

But subsequent encumbrancers and other adverse claimants are proper parties to such action, for they have ascertainable interests in the subject matter of the controversy. It is highly desirable that they be made parties to the action so that the decree or judgment may conclude the rights of all persons having any interest in the subject matter of the litigation. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

If a subsequent encumbrancer is not joined in an action to enforce a contractor's lien, he is not bound by the judgment in the action between the contractor and the owner, and one who purchases the property under that judgment takes it subject to the rights of the encumbrancer, whatever they may be. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

But neither the contractor nor any other interested party is precluded from relying on the contractor's prior lien as against subsequent encumbrancers because of the contractor's failure to make the subsequent encumbrancers parties to his action to enforce the lien brought against the owners within the statutory period. *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

Applied in Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc., 263 N.C. 641, 140 S.E.2d 330 (1965).

Stated in Lowery v. Haithcock, 239 N. C. 67, 79 S. E. (2d) 204 (1953).

Cited in United States v. Durham Lumber Co., 257 F. (2d) 570 (1958), affirmed in 363 U. S. 522, 80 S. Ct. 1282, 1285. 4 L. Ed. (2d) 1371 (1960).

§ 44-46. Execution.

Strict Construction.—The North Carolina Supreme Court has stated that the

statutory procedure for the enforcement of laborers' and materialmen's liens

must be strictly followed. In order to justify a departure from a strict construction of the statute, in the absence of any pronouncement of the North Carolina Supreme Court on the point, there must exist equities in favor of the party seeking to void the procedure outlined by the statute. *In re Haithcock*, 165 F. Supp. 182 (1958), holding that no such special equities existed in the instant case.

Property Subject to Lien Must Be Sold First.—Under this section, the property

subject to a contractor's special lien, i. e., the building and the lot on which it is situated, must be sold for the satisfaction of the judgment before resort can be had to the other property of the owner. *National Surety Corp. v. Sharpe*, 236 N. C. 35, 72 S. E. (2d) 109 (1952); *In re Haithcock*, 165 F. Supp. 182 (1958).

Stated in *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

§ 44-48. Discharge of liens.

Applied in *Rural Plumbing & Heating, Inc. v. Hope Dale Realty, Inc.*, 263 N.C. 641, 140 S.E.2d 330 (1965).

Stated in *Lowery v. Haithcock*, 239 N.

C. 67, 79 S. E. (2d) 204 (1953).

Cited in *Equitable Life Assur. Soc. v. Basnight*, 234 N. C. 347, 67 S. E. (2d) 390 (1951).

ARTICLE 9.

Liens upon Recoveries for Personal Injuries to Secure Sums Due for Medical Attention, etc.

§ 44-49. Lien created; applicable to persons non sui juris.—From and after March 26, 1935, there is hereby created a lien upon any sums recovered as damages for personal injury in any civil action in this State, the said lien in favor of any person or corporation to whom the person so recovering, or the person in whose behalf the recovery has been made, may be indebted for drugs, medical supplies, and medical services rendered by any physician, dentist, trained nurse, or hospitalization, or hospital attention and/or services rendered in connection with the injury in compensation for which the said damages have been recovered. Where damages are recovered for and in behalf of minors or persons non compos mentis, such liens shall attach to the sum recovered as fully and effectively as if the said person were sui juris.

Notwithstanding the provisions of paragraph one of this section, no lien therein provided for shall be valid with respect to any claims whatsoever unless the person or corporation entitled to the lien therein provided for shall file a claim with the clerk of the court in which said civil action is instituted within 30 days after the institution of such action.

No liens of the character provided for in the first paragraph of this section shall hereafter be valid with respect to money that may be recovered in any pending civil actions in this State unless claims based on such liens are filed with the clerk of the court in which the action is pending within 90 days after the ratification of the 1947 amendment.

No action shall lie against any clerk of court or any surety on any clerk's bond to recover any claims based upon any lien or liens created by the first paragraph of this section when recovery has heretofore been had by the person injured, and no claims against such recovery were filed with the clerk by any person or corporation, and the clerk has otherwise disbursed according to law the money recovered in such action for personal injuries. (1935, c. 121, s. 1; 1947, c. 1027; 1959, c. 800, s. 1.)

Editor's Note.—

The 1959 amendment, effective October 1, 1959, substituted "whatsoever" in line two of the second paragraph for the words "arising with respect to any future actions."

Strictly Construed.—This section and §

44-50 provide rather extraordinary remedies in derogation of the common law and must be strictly construed. *Ellington v. Bradford*, 242 N. C. 159, 86 S. E. (2d) 925 (1955).

Lien Created Where Beneficiary Indebted for Expenses.—The lien provided

for by this section is created only in cases where the beneficiary may be indebted for the expenses incurred. Ellington v. Bradford, 242 N. C. 159, 86 S. E. (2d) 925 (1955).

Minor Cannot Recover for Medical Expenses.—This section does not change the common-law rule so as to permit the recovery of expenses for medical treatment as a part of the minor's cause of action for injuries Ellington v. Bradford, 242 N. C. 159, 86 S. E. (2d) 925 (1955).

In a suit by parent as next friend to recover damages for personal injuries to

minor child, a motion by the defendant to strike allegations as to medical expenses should be allowed, since evidence as to such medical expenses would not have been competent in a trial of the action, as a minor child cannot recover medical expenses. Ellington v. Bradford, 242 N. C. 159, 86 S. E. (2d) 925 (1955).

Applied in In re Peacock, 261 N.C. 749, 136 S.E.2d 91 (1964).

Cited in Smith v. Hewett, 235 N. C. 615, 70 S. E. (2d) 825 (1952); **Doss v. Sewell,** 257 N. C. 404, 125 S. E. (2d) 899 (1962).

§ 44-50. Receiving person charged with duty of retaining funds for purpose stated; evidence; attorney's fees; charges.—Such a lien as provided for in G. S. 44-49 shall also attach upon all funds paid to any person in compensation for or settlement of the said injuries, whether in litigation or otherwise, and it shall be the duty of any person receiving the same before disbursement thereof to retain out of any recovery or any compensation so received a sufficient amount to pay the just and bona fide claims for such drugs, medical supplies, and medical attention and/or hospital service, after having received and accepted notice thereof: Provided, that evidence as to the amount of such charges shall be competent in the trial of any such action: Provided further, that nothing herein contained shall be construed so as to interfere with any amount due for attorney's services: Provided, further, that the lien hereinbefore provided for shall in no case, exclusive of attorneys' fees, exceed fifty per cent of the amount of damages recovered. (1935, c. 121, s. 2; 1959, c. 800, s. 2.)

Editor's Note.—The 1959 amendment, effective October 1, 1959, deleted the words "A like lien shall attach to" at the beginning of the section and substituted therefor the words "Such a lien as pro-

vided for in G. S. 44-49 shall also attach upon".

Strictly Construed. — See note to § 44-49.

ARTICLE 10.

Agricultural Liens for Advances.

§ 44-52. Lien on crops for advances.—If any person makes any advance either in money or supplies to any person who is engaged in or about to engage in the cultivation of the soil, or advances of wood, coal, kerosene, gasoline, fuel oil, or other combustible substance which is to be used in preparing a product of the soil for sale, the person making the advances is entitled to a lien on the crops made within one year from the date of the agreement in writing herein required upon the land in the cultivation of which the advance has been expended, in preference to all other liens, except laborer's and landlord's liens, to the extent of such advances. When such lien has been created by a tenant or a sharecropper, the lienholder shall acquire no rights against the landlord unless said lienholder notifies said landlord in writing of the existence of such lien before settlement is made between said landlord and said landlord and said tenant or sharecropper. The notice required herein shall give the office, book and page number where the lien is recorded. Before any advance is made an agreement in writing for the advance shall be entered into, specifying the amount to be advanced, or fixing a limit beyond which the advance, if made from time to time during the year, shall not go; and this agreement shall be registered in the office of the register of the county or counties where the land is situated on which the crops of the person advanced are to be grown. Provided, that where a county line

divides a farm the crop lien may be recorded in the county where the owner of said farm resides: Provided, he resides on said farm: Provided, that the lien shall continue to be good and effective as to any crop or crops which may be harvested after the end of the said year, and referred to in the said hen. (1866-7, c. 1, s. 1; 1872-3, c. 133, s. 1; Code, s. 1799; 1893, c. 9; Rev., s. 2052, C. S., s. 2480; 1925, c. 302, s. 1; 1927, c. 22; 1935, c. 205; 1955, c. 816; 1957, c. 999.)

Cross References.

For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper, see §§ 25-9-101 to 25-9-507.

I. IN GENERAL.

Editor's Note.—

The 1955 amendment extended the application of this section to advances of

wood, coal, kerosene, gasoline, fuel oil, and other combustible substances

The 1957 amendment, effective January 1, 1958, inserted the second and third sentences. Near the end of the second sentence the words "said landlord and" were apparently unintentionally repeated.

Section 2, c. 700, Session Laws 1965, repeals §§ 44-52 to 44-64, effective at midnight June 30, 1967.

§ 44-54. Price to be charged for articles advanced limited.

Stated in *Carolina Industrial Bank v. Merrimon*, 260 N.C. 335, 132 S.E.2d 692 (1963).

§ 44-62. Local: Short form of liens.—For the purpose of creating a valid agricultural lien under the preceding sections for supplies to be advanced and also to constitute a valid chattel mortgage as additional security thereto, and to secure a pre-existing debt, the following or a substantially similar form shall be deemed sufficient, and for those purposes legally effective, in the counties of Alamance, Alleghany, Anson, Ashe, Bladen, Brunswick, Buncombe, Burke, Cabarrus, Carteret, Caswell, Catawba, Chowan, Columbus, Craven, Cumberland, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Franklin, Gaston, Gates, Granville, Halifax, Harnett, Hertford, Hoke, Hyde, Iredell, Jones, Lenoir, Lincoln, Martin, McDowell, Mecklenburg, Moore, Nash, New Hanover, Northampton, Onslow, Pamlico, Pender, Person, Pitt, Polk, Randolph, Richmond, Robeson, Rockingham, Rowan, Rutherford, Sampson, Scotland, Transylvania, Tyrrell, Union, Vance, Wake, Washington, Watauga, Wayne and Wilson: North Carolina,

County.

(1951, c. 926, s. 1.)

Editor's Note.—

The 1951 amendment inserted "Hoke" in the list of counties in the first paragraph. As the rest of the section was not

changed it is not set out.

Cited in *McNeill v. McDougald*, 242 N.C. 255, 87 S. E. (2d) 502 (1955).

§ 44-63. Local: Rights on licensee's failure to cultivate.

Provision Only Applicable to Valid Lien.—The provision that the lien shall become due and collectible at once, if the person executing the lien does any act calculated to impair the security therein given, has no application, unless there is a valid lien. *McNeill v. McDougald*, 242 N.C. 255, 87 S. E. (2d) 502 (1955), hold-

ing that failure to charge provision was prejudicial error.

If plaintiff is estopped to deny that defendant had valid liens, that fact alone would not make the liens due and collectible prior to their maturity date. *McNeill v. McDougald*, 242 N.C. 255, 87 S. E. (2d) 502 (1955).

ARTICLE 11.

Liens for Internal Revenue.

§ 44-65 Filing notice of lien.

Lien Is Effective Only against Property of Taxpayer as Determined by State Law.

—The lien of the federal government for taxes upon the recording of notice of fed-

eral tax lien in the office of the register of deeds of a county is effective only against the property of the taxpayer, and the property or property rights of the taxpayer to which the lien attaches must be determined by State law. *Planters Nat'l Bank & Trust Co. v. South Carolina Ins. Co.*, 263 N.C. 32, 138 S.E.2d 812 (1964).

§ 44-66. Duty of register of deeds.—When a notice of such tax lien is filed, the register of deeds shall forthwith enter the same in alphabetical federal lien tax index to be provided by the board of county commissioners, showing on one line the name and residence of the taxpayer named in such notice, the collector's serial number of such notice, the date and hour of filing, and the amount of tax and penalty assessed. He shall file and keep all original notices so filed in numerical order in a file or files to be provided by the board of county commissioners and designated federal tax lien notices. The board of commissioners of each county is authorized to fix a fee for recording federal tax liens in the office of the register of deeds not to exceed two dollars (\$2.00) per lien and a fee for filing certificates of discharge not to exceed two dollars (\$2.00) per certificate. The fees provided herein are to be charged to the United States. (Ex. Sess. 1924, c. 44, s. 2; 1953, c. 1106, s. 1; 1963, c. 544.)

Editor's Note.—The 1953 amendment rewrote the last sentence of this section, which formerly provided that "This service shall be performed without fee."

The 1963 amendment substituted the last

two sentences for the former last sentence, which provided for a fee of seventy-five cents for all services required under this article.

§ 44-67. Certificate of discharge.—When a certificate of discharge of any tax lien, issued by the collector of internal revenue or other proper officer, is filed in the office of the register of deeds where the original notice of lien is filed, said register of deeds shall enter the same with date of filing in said federal tax lien index on the line where the notice of the lien so discharged is entered, and permanently attach the original certificate of discharge to the original notice of lien. (Ex. Sess. 1924, c. 44, s. 3; 1953, c. 1106, s. 2.)

Editor's Note.—The 1953 amendment struck out the words "This service shall be performed without fee", formerly appearing at the end of this section.

ARTICLE 12.

Liens on Leaf Tobacco and Peanuts.

§ 44-69. Effective period for lien on leaf tobacco sold in auction warehouse.

Editor's Note.—Session Laws 1955, c. 266, changed the title of this article from "Liens on Leaf Tobacco" to the present heading.

§ 44-69.1. Effective period for lien on peanuts.—No chattel mortgage, agricultural lien or other lien of any nature upon peanuts shall be effective for any purpose for a longer period than six months from the date of sale by the lienor. This section shall not absolve any person from prosecution and punishment for crime. (1955, c. 266.)

ARTICLE 13.

Factors' Liens.

§ 44-70. Definitions.

Cross Reference.—For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, con-

tract rights and chattel paper, see §§ 25-9-101 to 25-9-507.

Editor's Note.—Section 2, c. 700, Ses-

sion Laws 1965, repeals §§ 44-70 to 44-76, Co. v. Textile Banking Co., 248 N. C. 308, effective at midnight June 30, 1967. 103 S. E. (2d) 334 (1958).

Stated in Presley E. Brown Lumber

§ 44-71. Factors' liens; filing notice of lien.—If so provided by any written agreement, all factors shall have a continuing general lien upon all materials, goods in process, and merchandise from time to time consigned to or pledged with them, whether in their constructive, actual or exclusive occupancy or possession or not, for all their loans and advances to or for the account of the person creating the lien (hereinafter called the borrower), together with interest thereon and also for the commissions, obligations, indebtedness, charges, and expenses properly chargeable against or due from said borrower and for the amounts due or owing upon any notes or other obligations given to or received by them for or upon account of any such loans or advances, interest, commissions, obligations, indebtedness, charges, and expenses and such lien shall be valid from the time of filing the notice hereinafter referred to, whether such materials, goods in process, or merchandise shall be in existence at the time of the agreement creating the lien or at the time of filing such notice or shall come into existence subsequently thereto or shall subsequently thereto be acquired by the borrower; provided that a notice of the lien is filed stating:

1. The name of the factor, the name under which the factor does business, if an assumed name; the principal place of business of the factor within the State, or if he has no place of business within the State, his principal place of business outside of the State; and if the factor is a partnership or association, the name of the partners, and if a corporation, the state under whose laws it was organized.

2. The name of the borrower, and the interest of such person in the materials, goods in process, and merchandise, as far as known to the factor.

3. The general character of materials, goods in process, and merchandise subject to the lien, or which may become subject thereto, the date of the agreement and the period of time during which such loans or advances may be made under the terms of the agreement providing for such loans or advances and for such lien. Amendments of the notice may be filed from time to time to record any changes in the information contained in the original, subsequent or amended notices. (1945, c. 182, s. 2; 1955, c. 386, s. 1.)

Editor's Note.—The 1955 amendment, provision for posting the name of the factor and his designation as such. effective July 1, 1955, deleted the former

§ 44-73. Effect of registration.—Such notice may be filed for registration at any time after the making of the agreement and shall be effectual from the time of the filing thereof as against all claims of unsecured creditors of the borrower and as against subsequent liens of creditors, except that if, pursuant to the laws of this State, a lien should subsequently attach to the materials, goods in process, or merchandise in favor of a processor, dyer, mechanic, or other artisan, or in favor of a landlord, then the lien of the factor on such materials, goods in process, or merchandise shall be subject to such subsequent lien. When materials, goods in process, or merchandise subject to the lien provided for by this article are sold in the ordinary course of the business of the borrower, such lien, whether or not the purchaser has knowledge of the existence thereof, shall terminate as to the materials, goods in process, or merchandise and shall attach without further act, writing or formality to any obligation to pay for the same and to any other proceeds of such sale of goods of the borrower including such accounts receivable or obligation as may be created in the hands of the borrower, without filing an additional notice. (1945, c. 182, s. 4; 1955, c. 386, s. 2.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

§ 44-75. Common-law lien.—When any factor, or any third party for the account of any such factor, shall have possession of materials, goods in process,

or merchandise, such factor shall have a continuing general lien, as set forth in § 44-71, without filing the notice provided for in this article. (1945, c. 182, s. 6; 1955, c. 386, s. 3.)

Editor's Note. — The 1955 amendment deleted the words "and posting the sign" which formerly appeared immediately af-

ter the word "notice" in the last line of the section.

ARTICLE 14.

Assignment of Accounts Receivable and Liens Thereon.

§ 44-77. Definitions.

(1) "Account" or "account receivable" means a right to the present or future payment of money—

(a) Under an existing contract, or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for,

(b) Not including a building or construction contract,

(c) The assignment of which right is not subject to special statutory provisions not contained in this article,

(d) Which right to payment is not secured under a chattel mortgage, deed of trust, conditional sale, or other instrument, which is required to be recorded in order that no assignee from the assignor and no creditor of the assignor can after such recordation acquire any rights in the account assigned, or in the proceeds thereof in any form, superior to the rights of the beneficiary of such recorded instrument and,

(e) Which right to payment is not represented by a judgment, negotiable instrument, or other instrument, the surrender presentation possession or indorsement of which customarily gives to the owner, holder or indorsee the right to payment thereon.

(1957, c. 504.)

Cross Reference. — For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper see §§ 25-9101 to 25-9507.

Editor's Note. — The 1957 amendment deleted the words "presently subsisting" formerly appearing before "right" in line one of subsection (1) and added at the end of paragraph (a) the words "or under a future contract entered into during the effective period of the notice of assignment hereinafter provided for." As only subsection (1) was affected by the amendment the rest of the section is not set out.

Section 2, c. 700, Session Laws 1965, repeals §§ 44-77 to 44-85, effective at midnight June 30, 1967.

Effect and Application of 1957 Amendment. — This section as originally enacted was by express language limited to "a presently subsisting right to the present or future payment of money—(a) Under an existing contract." Not until 1957 was it possible in this State to give constructive notice of the assignment of an ac-

count to accrue under a contract to be subsequently made. And where an agreement providing for such an assignment was registered, and action was brought thereon, before the effective date of the 1957 amendment to this section, the provisions of the amendment were not applicable and the registration of the agreement did not constitute notice of the equitable assignment. *Presley E. Brown Lumber Co. v. Textile Banking Co.*, 248 N.C. 308, 103 S.E. (2d) 334 (1958).

This article does not provide an exclusive method of giving security by mortgage, pledge or assignment of choses in action. *In re Steele*, 122 F. Supp. 948 (1954).

A transfer or assignment of accounts receivable in connection with sales by a going concern is outside the scope of this article. *In re Steele*, 122 F. Supp. 948 (1954).

Quoted in *King v. Premo & King, Inc.*, 258 N.C. 701, 129 S.E. (2d) 493 (1963).

Cited in *In re Battery King Mfg. Co.*, 240 N.C. 586, 83 S.E. (2d) 490 (1954).

§ 44-78. Filing of notice of assignment; cancellation.

(3) The place for filing the notice of assignment shall be the office of the

register of deeds of the county wherein the assignor, if an individual, resides; or if the assignor is a domestic or domesticated corporation which has a registered office in this State, the notice of assignment must be filed in the county wherein such registered office is located; or if the corporation has no such registered office in this State but does have a principal office in this State as shown by its certificate of incorporation or amendment thereto or legislative charter or, in case of a domesticated corporation, as shown by its statement filed with the Secretary of State, the notice of assignment must be filed in the county wherein the principal office is said to be located by such certificate of incorporation or amendment thereto or legislative charter or such statement filed with the Secretary of State. If the assignor is a resident or nonresident firm, partnership, association or a nonresident individual or a foreign undomesticated corporation, then the notice of assignment shall be filed in the office of the register of deeds of any county wherein the assignor has a place of business.

(1957, c. 564.)

Editor's Note.—The 1957 amendment rewrote the first sentence of subsection (3). As only this subsection was changed the rest of the section is not set out.

This article prescribes two methods of protecting an assignment of accounts receivable: (1) By the registration of a notice of assignment in the public registry of the county of residence of the assignor as provided by this section; or (2) by

"the giving of written notice to the debtor that the account has been assigned to the named assignee" as provided by G.S. 44-80 (1), (c). In re Battery King Mfg Co., 240 N.C. 586, 83 S.E. (2d) 490 (1954).

Cited in In re Steele, 122 F. Supp. 948 (1954); Haworth v. General Motors Accept. Corp., 238 F. (2d) 203 (1956); King v. Premo & King, Inc., 258 N.C. 701, 129 S.E. (2d) 493 (1963).

§ 44-80. Protected assignments.

Methods of Protecting Assignment of Accounts.—See note to § 44-78.

Notice of assignment of account by seller on copy of invoice received by wholly owned subsidiary of purchaser two days prior to receivership of seller was notice to purchaser within the meaning of subsection (1) (c) of this section; and such

assignment defeats the purchaser's right to setoff. In re Battery King Mfg Co., 240 N.C. 586, 83 S.E. (2d) 490 (1954).

Quoted in Scarborough v. Berkshire Fine Spinning Associates, 128 F. Supp. 948 (1955); King v. Premo & King, Inc., 258 N.C. 701, 129 S.E. (2d) 493 (1963).

§ 44-82. Rights between debtor and assignee.

Cited in In re Steele, 122 F. Supp. 948 (1954).

§ 44-84. Returned goods.

Proceeds of Sale Held in Trust.—Where seller assigned account for merchandise prior to return of merchandise from buyer to seller, and receiver of seller resold merchandise to buyer, the receiver

held the proceeds of resale in trust for assignee. In re Battery King Mfg. Co., 240 N.C. 586, 83 S.E. (2d) 490 (1954).

Quoted in King v. Premo & King, Inc., 258 N.C. 701, 129 S.E. (2d) 493 (1963).

§ 44-85. Short title.

Cited in In re Steele, 122 F. Supp. 948 (1954); In re Battery King Mfg. Co., 240 N.C. 586, 83 S.E. (2d) 490 (1954).

Chapter 45.

Mortgages and Deeds of Trust.

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ARTICLE 1.

*Chattel Securities.***§ 45-2. Registration.****Cross References.—**

As to perfection of security interests in

vehicles requiring certificates of title, see
§§ 20-58 to 20-58.10.

§ 45-3. Mortgage of household and kitchen furniture.—(a) Except as provided in subsection (b) of this section, all conveyances of household and kitchen furniture by a married person, made to secure the payment of money or other things of value, are void unless his or her spouse joins therein and their acknowledgments are taken in the manner prescribed by law in conveyances of real estate.

(b) A conveyance referred to in subsection (a) of this section is valid without the joinder of the spouse if:

- (1) The conveyance is made to secure the payment of all or part of the purchase price of the property conveyed; or
- (2) The spouse not joining in the conveyance has been adjudged a lunatic or insane; or
- (3) The spouse who executes the conveyance is authorized to do so by a valid and lawful deed of separation previously executed by the husband and wife; or
- (4) The spouse who executes the conveyance is the spouse not at fault in one of the instances described in G.S. 31A-1 (d). (1891, c. 91; Rev., s. 1041; C. S., s. 2577; 1931, c. 211; 1945, c. 73, s. 8; 1965, c. 794.)

Editor's Note.—

The 1965 amendment rewrote this section.

§ 45-3.1. Right of installment buyers to possession.—If any chattel is sold or agreed to be sold, and it is agreed between the parties to the sale that part or all of the price is to be paid in one or more installments, which are secured either by conditional sale, purchase money chattel mortgage, purchase money chattel deed of trust, or similar security, on the chattel sold, and possession of the chattel is by consent of the parties placed in the buyer, it shall be deemed to be the intention of the parties, in the absence of an express agreement to the contrary, that he shall have the right to retain such possession until he defaults by failing to make a payment as agreed or otherwise failing to comply with the terms of the sale or security, or by failing to provide care and maintenance of the chattel in such a manner as to cause damage or injury to it, or by using the chattel for any purpose prohibited by law. (1961, c. 211.)

Editor's Note.—The act adding this section and changing the article heading was effective as of Oct. 1, 1961.

For comment on this section, see 40 N.C. Law Rev. 81.

Mortgagee Was Formerly Entitled to Possession Prior to Default.—Until modified by this section, a mortgagee of chattels or his assignee was, in the absence of an agreement to the contrary, entitled to possession of the mortgaged property even prior to a default. *Rea v. Universal C. I. T. Credit Corp.*, 257 N.C. 639, 127 S.E. (2d) 225 (1962).

After Default Mortgagee May Exercise Right to Possession without Process of

Law.—After default a mortgagee is entitled to possession of the mortgaged property and he may exercise that right without process of law provided he does so peacefully. *Rea v. Universal C. I. T. Credit Corp.*, 257 N.C. 639, 127 S.E. (2d) 225 (1962).

Right to Enter Premises of Mortgagor.—Where the mortgage contains an express provision authorizing mortgagee to peacefully enter the premises of mortgagor and take possession, such entry and taking is not wrongful. *Rea v. Universal C. I. T. Credit Corp.*, 257 N.C. 639, 127 S.E. (2d) 225 (1962).

ARTICLE 2.

Right to Foreclose or Sell under Power.

§ 45-4. Representative succeeds on death of mortgagee or trustee in deeds of trust; parties to action.

Joint Exercise of Power of Sale.—While the executors of a deceased mortgagee may exercise the power of sale in the mortgage where there are two executors of the deceased mortgagee the power must

be exercised by them jointly. Combs v. Porter, 231 N. C. 585, 58 S. E. (2d) 100 (1950)

Stated in Gregg v. Williamson, 246 N. C. 356, 98 S. E. (2d) 481 (1957).

§ 45-8. Survivorship among donees of power of sale.

Cited in Gregg v. Williamson, 246 N. C. 356, 98 S. E. (2d) 481 (1957).

§ 45-9. Clerk appoints successor to incompetent trustee.

Cited in Mast v. Blackburn, 248 N. C. 231, 102 S. E. (2d) 812 (1958).

§ 45-10. Substitution of trustees in mortgages and deeds of trust.

Cited in Gaskins v. Blount Fertilizer Co., 260 N.C. 191, 132 S.E.2d 345 (1963).

§ 45-18. Validation of certain acts of substituted trustees.—Whenever before February 1, 1963, a trustee has been substituted in a deed of trust in the manner provided by §§ 45-10 to 45-17, but the instrument executed by the holder and/or owners of all or a majority in amount of the indebtedness, notes, bonds, or other instruments secured by said deed of trust, and the certificate of the clerk of the superior court executed in connection therewith under the provisions of § 45-12, have not been registered as provided by said sections until after the substituted trustee has exercised some or all of the powers conferred by said deed of trust upon the trustee therein, including the advertising of the property conveyed by said deed of trust for sale, the sale thereof, and the execution of a deed by such substituted trustee to the purchaser at such sale, all such acts of said substituted trustee shall be deemed valid and effective in the same manner and to the same extent as if said instrument substituting said trustee, and the clerk's certificate thereon has been registered prior to the performance by said substituted trustee of any one or more of said acts, or other acts authorized by such deed of trust. (1939, c. 13; 1963, c. 241.)

Editor's Note.—

The 1963 amendment substituted "Fe-

bruary 1, 1963," for "February 3, 1939," near the beginning of the section.

§ 45-20.2. Further validation of trustees' deeds where seals omitted.—All deeds executed prior to the first day of March, 1965, by any trustee or substitute trustee in the exercise of the power of sale vested in him under any deed, deed of trust, mortgage, will or other instrument in which the trustee or substitute trustee has omitted to affix his seal after his signature, if otherwise valid, shall not be rendered invalid by reason of omission of said seal, provided, however, that this section shall not apply to any pending litigation. (1965, c. 147.)

ARTICLE 2A.

Sales under Power of Sale.

Part 1. General Provisions.

§ 45-21.2. Article not applicable to foreclosure by court action.

Quoted in Certain Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 45-21.5. Place of sale of personal property.

(b) When the instrument does not designate the county in which a sale of personal property shall be held, the sale may be held in any county—

(1) Where such instrument is recorded, if it has been recorded as provided by G. S. § 47-20 or G. S. § 47-23, or

(2) Where the property, or any part thereof, is located when the mortgagee, trustee or vendor takes possession of, or repossesses, it.

(1955, c. 1345, s. 2.)

Editor's Note. — The 1955 amendment substituted "Where" for "When" at the beginning of subsection (b). As the rest

of the section was not changed only subsection (b) is set out.

§ 45-21.12. Power of sale barred when foreclosure barred.

Ten-Year Period Runs from Maturity of Note or Notes Secured. — The right to exercise any power of sale contained in a deed of trust is barred after ten years from the maturity of any note or notes secured thereby, where no payments have been made thereon extending the statute. *Lowe v. Jackson*, 263 N.C. 634, 140 S.E.2d 1 (1965).

Or from Last Payment Thereon. — The power referred to in this section must be exercised within the ten-year period following the maturity of the note, or from the last payment thereon. *Lowe v. Jackson*, 263 N.C. 634, 140 S.E.2d 1 (1965).

Cited in *Moore v. Owens*, 255 N. C. 336, 121 S. E. (2d) 540 (1961).

§ 45-21.14. Clerk's authority to compel report or accounting; contempt proceeding.

Cross Reference. — See note to § 45-21.26.

Part 2. Procedure for Sale.**§ 45-21.16. Contents of notice of sale.** — The notice of sale shall—

(1) Refer to the instrument pursuant to which the sale is held.

(2) Designate the date, hour and place of sale consistent with the provisions of the instrument and this article;

(3) Describe real property to be sold substantially as it is described in the instrument containing the power of sale, and may add such further description as will acquaint bidders with the nature and location of the property.

(4) Describe personal property to be sold substantially as it is described in the instrument pursuant to which the power of sale is being exercised, and may add such further description as will acquaint bidders with the nature of the property;

(5) State the terms of the sale provided for by the instrument pursuant to which the sale is held, including the amount of the cash deposit, if any, to be made by the highest bidder at the sale;

(6) Include any other provisions required by the instrument to be included therein, and

(7) State that the property will be sold subject to taxes and special assessments if it is to be so sold (1949, c. 720, s. 1; 1951, c. 252, s. 1.)

Editor's Note. — The 1951 amendment added subsection (7)

§ 45-21.17. Posting and publishing notice of sale of real property.

(b) When the instrument pursuant to which a sale of real property is to be held contains no provision with respect to posting or publishing notice of the sale of real property, the notice shall—

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale.

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the

county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but

- b. If no such newspaper is published in the county, then notice shall be published once a week for at least four successive weeks in a newspaper having a general circulation in the county.

(1965, c. 41.)

Editor's Note.—Prior to the 1965 amendment, effective Sept. 1, 1965, paragraph b of subdivision (2) of subsection (b) provided for posting the notice at three other public places in the county. As only subsection (b) was changed by the amendment, the rest of the section is not set out.

§ 45-21.26. Preliminary report of sale of real property.

- (4) The date, time and place of the sale;

(1951, c. 252, s. 2.)

Editor's Note. — The 1951 amendment rewrote paragraph (4) of subsection (b). As the rest of the section was not changed only paragraph (4) is set out.

Failure to Report within Five Days.—If a trustee fails to report within the five days directed by this section, the clerk may compel a report under § 45-21.14. When the clerk assumes jurisdiction and orders

Advertisement Gives Mortgagor Required Notice.—The mortgagor is always entitled to notice of sale under foreclosure, but notice is given when the advertisement required by this section is made. *Woodell v. Davis*, 261 N.C. 160, 134 S.E.2d 160 (1964).

§ 45-21.27. Upset bid on real property; compliance bonds.—(a) An upset bid is an advanced, increased, or raised bid whereby any person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first \$1000 thereof plus five per cent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash, or by certified check or cashier's check satisfactory to the said clerk, with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(1963, c. 377.)

Editor's Note.—

The 1963 amendment inserted "or by certified check or cashier's check satisfactory to the said clerk" near the middle of subsection (a). As only subsection (a) was affected by the amendment the rest of the section is not set out.

Statute Incorporated in Mortgages and Deeds of Trust.—

The provisions of former § 45-28 were by operation of law, incorporated in all mortgages and deeds of trust and enter into and control any sale under such instruments. *Foust v. Gate City Sav., etc., Ass'n*, 233 N.C. 35, 62 S.E. (2d) 521 (1950).

Authority of Clerk—When Supervisory Power Begins.—

Supervisory authority conferred by this section relates to resales and does not

a resale based on a raised bid, his orders are not void. *Gallos v. Lucas*, 252 N.C. 480, 113 S.E. (2d) 923 (1960).

If a trustee fails to report a foreclosure sale within the five days as directed by this section, the clerk is authorized to compel such report. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

arise until an upset bid has been filed with the clerk as provided therein. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

Under former § 45-28 the jurisdiction of the clerk vested at the moment an upset bid was filed with him. Thereafter he had supervisory power over the sale which continued until after the final sale and confirmation thereof. *Foust v. Gate City Sav., etc., Ass'n*, 233 N.C. 35, 62 S.E. (2d) 521 (1950).

Irregularity Requiring Vacatin of Confirmation and Deed.—After upset bid under former § 45-28 the property in suit, having a market value of from \$5,500 to \$6,000, was actually sold for \$825. The trustee erroneously reported the bid as \$6,400, which report was on record in the clerk's office from the date of the sale un-

til confirmation. It was held that the irregularity was of such substantial nature as to require a court of equity to vacate the confirmation and the deed pursuant thereto without requiring trustees to prove that anyone was misled or failed to file

an upset bid by reason of the erroneous report. *Foust v. Gate City Sav., etc.*, Ass'n, 233 N. C. 35, 62 S. E. (2d) 521 (1950).

Cited in *In re Hardin*, 248 N. C. 66, 102 S. E. (2d) 420 (1958).

§ 45-21.29. Resale of real property; jurisdiction; procedure; writs of assistance and possession.

(h) When a resale of real property is had pursuant to an upset bid, such sale may not be consummated until it is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting any further upset bid, pursuant to G. S. 45-21.27, has expired.

(i) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales.

(j) The clerk of the superior court shall make all such orders as may be just and necessary to safeguard the interests of all parties, and shall have authority to fix and determine all necessary procedural details with respect to resales in all instances in which this article fails to make definite provision as to such procedure.

(k) Upon the completion or confirmation of any sale or resale of real property held in the exercise of the power of sale contained in any mortgage or deed of trust and pursuant to the provisions of this article, the clerk of the superior court of the county within which said sale is held is empowered to issue writs of assistance and possession to place the purchaser in possession of the property sold upon the following conditions: When application has been made to the clerk by the mortgagee, the trustee named in such deed of trust, any substitute trustee, or the purchaser of said property, provided he has paid the purchase price bid. Provided, further, that no writ of assistance and possession shall be issued by the clerk unless the applicant has given ten (10) days' notice to the party or parties in possession of the real property, or any part thereof, at the time of the sale. (1949, c. 720, s. 1; 1951, c. 252, s. 3; 1965, c. 299.)

Editor's Note.—

The 1951 amendment inserted a new subsection (h) and designated former subsections (h) and (i) as (i) and (j), respectively.

The 1965 amendment inserted new subsection (k).

As only subsections (h) through (k)

were affected by the amendments, the rest of the section is not set out.

Quoted in *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

Cited in *Gallos v. Lucas*, 252 N. C. 480, 113 S. E. (2d) 923 (1960).

§ 45-21.31. Disposition of proceeds of sale; payment of surplus to clerk.—(a) The proceeds of any sale shall be applied by the person making the sale, in the following order, to the payment of—

(1) Costs and expenses of the sale, including the trustee's commission, if any, and a reasonable auctioneer's fee if such expense has been incurred;

(2) Taxes due and unpaid on the property sold, as provided by G. S. § 105-408, if the property sold is real property, unless the notice of sale provided that the property be sold subject to taxes thereon and the property was so sold;

(3) Special assessments, or any installments thereof, against the property sold, which are due and unpaid, as provided by G. S. § 105-408, if the property sold is real property, unless the notice of sale provided that the property be sold subject to special assessments thereon and the property was so sold;

(4) The obligation secured by the mortgage, deed of trust or conditional sale contract.

(1951, c. 252, s. 1.)

Editor's Note.—The 1951 amendment at the end of paragraph (2) beginning changed subsection (a) by adding a clause with the words "unless the notice". It

also added a similar clause at the end of paragraph (3). As the rest of the section was not affected by the amendment only subsection (a) is set out.

Liability of Trustee for Failure to Pay Over Surplus to Clerk.—Under subsection (b) (4) of this section, the trustee or mortgagee must pay into the hands of the clerk of the superior court the surplus remaining after foreclosure in all cases where adverse claims to the funds are asserted, and where the trustee pays such funds into the hands of the administrator of the deceased trustor, the trustee remains liable therefor until they are paid into the hands of the clerk as provided by law. *Lenoir County v. Outlaw*, 241 N. C. 97, 84 S. E. (2d) 330 (1954).

§ 45-21.32. Special proceeding

Clerk and Not Administrator Determines Priority of Payment of Surplus Claims.—Where there are adverse claims against the surplus realized upon the foreclosure of a deed of trust after the death of the trustor, and a proceeding is instituted pursuant to this section to determine who is entitled to such funds, it is the clerk and not the administrator who determines the priority of payments, al-

though the administrator claiming the funds is a necessary party. *Lenoir County v. Outlaw*, 241 N. C. 97, 84 S. E. (2d) 330 (1954).

Applied in *Staunton Military Academy, Inc. v. Dockery*, 244 N. C. 427, 94 S. E. (2d) 354 (1956).

Cited in *Childers v. Powell*, 243 N. C. 711, 92 S. E. (2d) 65 (1956); *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N. C. 573, 111 S. E. (2d) 904 (1960).

to determine ownership of surplus.

though the administrator claiming the funds is a necessary party. *Lenoir County v. Outlaw*, 241 N. C. 97, 84 S. E. (2d) 330 (1954).

Cited in *Childers v. Powell*, 243 N. C. 711, 92 S. E. (2d) 65 (1956); *United States v. Williams*, 139 F. Supp. 94 (1956); *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N. C. 573, 111 S. E. (2d) 904 (1960).

ARTICLE 2B.

Injunctions; Deficiency Judgments.

§ 45-21.34. Enjoining mortgage sales or confirmations thereof on equitable grounds.

"Confirmation" Means Confirmation Required for Consummation. — "Confirmation," as used in this section refers only to a foreclosure sale where confirmation is required for consummation in accordance with law. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

And Confirmation Is Not Required of Sale under Power If No Upset Bid Filed.—Where a foreclosure sale is conducted in accordance with the provisions of article 2A of this chapter, and no upset bid is filed as provided in § 45-21.27, there is no legal requirement that the clerk either confirm the sale or direct the execution of a trustee's deed as a prerequisite to legal consummation of such sale by the trustee. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

Mere Inadequacy of Price Is Insufficient to Upset Sale.—Mere inadequacy of the purchase price realized at a foreclosure sale, standing alone, is not sufficient to upset a sale, duly and regularly made in

strict conformity with the power of sale. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

But Court Will Interpose Where Gross Inadequacy Is Coupled with Other Inequity.—Gross inadequacy of consideration, when coupled with any other inequitable element, even though neither, standing alone, may be sufficient for the purpose, will induce a court of equity to interpose and do justice between the parties. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

And Gross Inadequacy May Be Considered in Weighing Materiality of Irregularity.—Where there is an irregularity in the sale, gross inadequacy of purchase price may be considered on the question of the materiality of the irregularity. *Certain-Teed Prods. Corp. v. Sanders*, 264 N.C. 234, 141 S.E.2d 329 (1965).

Cited in *Roberson v. Boone*, 242 N. C. 598, 89 S. E. (2d) 158 (1955); *In re Hardin*, 248 N. C. 66, 102 S. E. (2d) 420 (1958).

§ 45-21.35. Ordering resales before confirmation; receivers for property; tax payments.

Stated in Certain-Teed Prods. Corp. v. Sanders, 264 N.C. 234, 141 S.E.2d 329 (1965).

§ 45-21.36. Right of mortgagor to prove in deficiency suits reasonable value of property by way of defense.

Section Inapplicable.—Where an action is not one to recover from the estate of a deceased a balance due upon an indebtedness secured by a deed of trust, but is an action to establish the rights of the parties with respect to the proceeds of a life insurance policy assigned by the deceased

as security for the debt, the statutory principle of law regulating the recovery of deficiency judgments embodied in this section has no application. Thompson v. Pilot Life Ins. Co., 234 N.C. 434, 67 S.E. (2d) 444 (1951).

§ 45-21.38. Deficiency judgments abolished where mortgage represents part of purchase price; deficiency judgment under conditional sale contract.—In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provisions as herein set out.

Whenever a power of sale contained in a conditional sale contract, or granted by statute with respect thereto, is exercised, and the proceeds of such sale are not sufficient to defray the expenses thereof, and also the expenses of retaking, keeping and storing the goods and the balance due upon the purchase price, the seller may recover the deficiency from the buyer, or from anyone who has succeeded to the obligations of the buyer. (1933, c. 36; 1949, c. 720, s. 3; c. 856; 1961, c. 604.)

Editor's Note.—

The 1961 amendment inserted immediately after the word "secure" in line four the words "to the seller the."

Section Held Inapplicable.—Where the deed of trust covered land other than that purchased from the plaintiffs by the defendants, it could not qualify as a purchase money deed of trust under this section. This was true because a deed of trust is a purchase money deed of trust only if it is made as a part of the same transaction in which the debtor purchases land, embraces the land so purchased, and secures all or part of its purchase price. *Dobias v. White*, 239 N.C. 409, 80 S.E. (2d) 23 (1954).

To Unsecured Note with Endorsers.—This section has no application to an unsecured note with endorsers given by the purchaser of land in addition to a cash pay

ment and a purchase money note secured by deed of trust on the property. *Brown v. Owens*, 251 N.C. 348, 111 S.E. (2d) 705 (1959).

Seller Liable for Buyer's Losses If Note and Security Do Not Disclose They Are for Purchase Money.—This section makes the seller liable for losses which the purchaser sustains because of seller's failure to insert a statement that debt is for purchase money in a note and deed of trust prepared by it or under its supervision. *Childers v. Parker's, Inc.*, 259 N.C. 237, 130 S.E. (2d) 323 (1963).

But No Loss Is Suffered Until Payment or Judgment against Buyer.—Where there has been a foreclosure and the proceeds are insufficient to pay the amount called for in the note, purchaser has not sustained a loss as contemplated by this section until he has been compelled to pay or judgment

has been rendered fixing his liability. *Chil-*
ders v. Parker's, Inc., 259 N. C. 237, 130 S.
E. (2d) 323 (1963).

Cited in *Mitchell v. Battle*, 231 N. C. 68,
55 S. E. (2d) 803 (1949).

Applied in *Fleishel v. Jessup*, 242 N. C.
605, 89 S. E. (2d) 160 (1955).

ARTICLE 2C.

Validating Sections; Limitation of Time for Attacking Certain Foreclosures.

§ 45-21.42. Validation of deeds where no order or record of confirmation can be found.—In all cases prior to the first day of March, one thousand nine hundred and fifty-seven where sales of property have been made under the power of sale contained in any deed of trust, mortgage or other instrument conveying property to secure a debt or other obligation, or where such sales have been made pursuant to an order of court in foreclosure proceedings and deeds have been executed by any trustee, mortgagee, commissioner, or person appointed by the court, conveying the property, or security, described therein, and said deed, or other instrument so executed, containing the property described therein, to the highest bidder or purchaser of said sale and such deed, or other instrument, contains recitals to the effect that said sale was reported to the clerk of the superior court, or to the court, and/or such sale was duly confirmed by the clerk of the superior court, or court, then and in that event all such deeds, conveyances, or other instruments, containing such recitals are declared to be lawful, valid and binding upon all parties to the proceedings, or parties named in such deeds of trust, mortgages, or other orders or instruments, and are hereby declared to be effective and valid to pass title for the purpose of transferring title to the purchasers at such sales with the same force and effect as if an order of confirmation had been filed in the office of the clerk of the superior court, or with the court, together with all necessary reports and other decrees and to the same effect as if a record had been made in the minutes of the court of such orders, decrees and confirmations, provided that nothing contained in this section shall be construed as applicable to or affecting pending litigation. (1945, c. 984; 1949, c. 720, s. 4; 1957, c. 505.)

Editor's Note.—The 1957 amendment substituted "fifty-seven" for "forty-five" in line two.

§ 45-21.43. Validation of certain foreclosure sales. — In all cases where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement and sale in the county where such real estate is located, notwithstanding the wording of such mortgages or deeds of trust providing for advertisement or sale, or both, in some other county, or at some other particular place in the county in which the real estate is located, which place was in fact designated in the notice of sale, all such sales are hereby fully validated, ratified and confirmed and shall be as effective to pass title to the real estate described therein as fully and to the same extent as if such mortgages or deeds of trust had provided for advertisement and sale in the county where such real estate is actually situate. (1951, c. 220; 1961, c. 537.)

Editor's Note. — The 1961 amendment inserted the words "or at some other particular place in the county in which the real estate is located, which place was in fact designated in the notice of sale."

§ 45-21.44. Validation of foreclosure sales when provisions of G. S. 45-21.17 (c) (2) not complied with.—In all cases prior to June 1, 1963, where mortgages or deeds of trust on real estate with power of sale have been foreclosed pursuant to said power by proper advertisement except that the date of the last publication was from seven to twenty days preceding the date of sale, all such sales are fully validated, ratified, and confirmed and

shall be as effective to pass title to the real estate described therein as fully and to the same extent as if the provisions of G. S. 45-21.17 (c) (2) had been fully complied with. (1959, c. 52; 1963, c. 1157.)

Editor's Note.—The 1963 amendment substituted "June 1, 1963" for "March 1, 1959" near the beginning of this section.

ARTICLE 4.

Discharge and Release.

§ 45-36.2. Register of deeds includes assistants and deputies.—The words "register of deeds" appearing in this article shall be interpreted to mean "register of deeds, assistant register of deeds, or deputy register of deeds." (1953, c. 848.)

§ 45-37. Discharge of record of mortgages and deeds of trust.

5. The conditions of every mortgage, deed of trust, or other instrument securing the payment of money shall be conclusively presumed to have been complied with or the debts secured thereby paid as against creditors or purchasers for a valuable consideration from the trustor, mortgagor, or grantor, from and after the expiration of fifteen years from the date when the conditions of such instrument by the terms thereof are due to have been complied with, or the maturity of the last installment of debt or interest secured thereby, irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years, unless the holder of the indebtedness secured by such instrument or party secured by any provision thereof shall file an affidavit with the register of deeds of the county where such instrument is registered, in which shall be specifically stated the amount of debt unpaid, which is secured by said instrument, or in what respect any other condition thereof shall not have been complied with, whereupon the register of deeds shall record such affidavit and refer on the margin of the record of the instrument referred to therein the fact of the filing of such affidavit, and a reference to the book and page where it is recorded.

(1951, c. 292, s. 1.)

Local Modification.—Dare: 1957, c. 464.

Editor's Note.—The 1951 amendment inserted the words "irrespective of whether the credit was extended or the purchase was made before or after the expiration of said fifteen years," immediately after the word "thereby" in line seven of the first sentence of paragraph 5. As the rest of the section was not affected by the amendment only this sentence is set out.

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 408.

History of Section.—See Gregg v. Williamson, 246 N. C. 356, 98 S. E. (2d) 481 (1957).

1945 Amendment Constitutional as Applied to Pre-existing Mortgages.—The 1945 amendment to subsection (5) of this section, providing that the statute should apply to pre-existing mortgages, but allowing one year from the ratification of the act during which the owners of the debts might proceed to foreclosure or make marginal entry on the instrument that the debt is still outstanding, is constitutional. Gregg v. Williamson, 246 N. C. 356, 98 S. E. (2d) 481 (1957).

Unauthorized Cancellation of Deed of Trust.—See Monteith v. Welch, 244 N. C. 415, 94 S. E. (2d) 345 (1956).

Cited in Moore v. Owens, 255 N. C. 336,

121 S. E. (2d) 540 (1961).

§ 45-37.2. Recording satisfactions of deeds of trust and mortgages in counties using microfilm.—In any county in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any other method or process which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the satisfaction and cancel the record of each such instrument satisfied by recording a notice of satisfaction which shall consist of a separate instrument, or that part

of the original deed of trust or mortgage re-recorded, reciting the names of all parties to the original instrument, the amount of the obligation secured, the date of satisfaction of the obligation, the appropriate entry of satisfaction as provided in G. S. 45-37, a reference by book and page number to the record of the instrument satisfied, and the date of recording the notice of satisfaction. There shall also be entered in the alphabetical indexes kept by the register of deeds, opposite the name of each grantor and grantee of the deed of trust or mortgage, the word "satisfied" followed by a reference to the book and page of the record notice of satisfaction. (1963, c. 1021, s. 1.)

§ 45-38. Entry or recording of foreclosure.—In case of foreclosure of any deed of trust, or mortgage, the trustee or mortgagee shall enter upon the margin of the record thereof the fact that such foreclosure and the date when, and the person to whom, a conveyance was made by reason thereof. In the event the entire obligation secured by a mortgage or deed of trust is satisfied by a sale of only a part of the property embraced within the terms of the mortgage or deed of trust, the trustee or mortgagee shall make an additional notation as to which property was sold and which was not sold.

Provided, that in counties in which deeds of trust and mortgages are recorded in the office of the register of deeds by a microphotographic process or by any process or method which renders impractical or impossible the subsequent entering of marginal notations upon the records of instruments, the register of deeds shall record the foreclosure of each deed of trust or mortgage foreclosed by recording a notice of foreclosure which shall consist of a separate instrument, or that part of the original deed of trust or mortgage re-recorded, reciting the information required hereinabove, the names of all parties to the original instrument, the amount of the obligation secured, a reference by book and page number to the record of the instrument foreclosed, and the date of recording the notice of foreclosure. There also shall be entered in the alphabetical indexes kept by the register of deeds, opposite the name of each grantor and grantee to the original deed of trust or mortgage, the word "foreclosed," followed by a reference to the book and page of the record notice of foreclosure. (1923, c. 192, s. 2; C. S., s. 2594(a); 1949, c. 720, s. 2; 1963, c. 1021, s. 2.)

Editor's Note.—

The 1963 amendment added the second paragraph.

§ 45-40. Register to enter satisfaction on index.—When satisfaction of the provisions of any deed of trust or mortgage is acknowledged and entry of such acknowledgment of satisfaction is made upon the margin of the record of said deed of trust or mortgage, or when the register of deeds or his deputy shall cancel the mortgage or other instrument by entry of satisfaction, then the register of deeds or his deputy shall enter upon the alphabetical grantor index kept by him, as required by law, and opposite the names of the grantor and grantee and on a line with the names of said grantor and grantee, the words "satisfied mortgage," if the instrument of which satisfaction has been acknowledged or entered is a mortgage, and the words "satisfied deed of trust," if the instrument of which satisfaction has been acknowledged or entered is a deed of trust, or, in lieu of the entries herein provided, the register of deeds or his deputy may denote satisfaction in the grantor index by using a capital "C" or the word "Cancelled," or the word "Satisfied." (1909, c. 658, s. 1; C. S., s. 2595; 1965, c. 771.)

Editor's Note.— The 1965 amendment substituted "grantor index" for "indexes" near the middle of the section, and added all of the language at the end of the section following the words "is a deed of trust."

§ 45-42. Release of corporate mortgages by corporate officers.—All mortgages and deeds in trust executed to a corporation may be satisfied and so

marked of record as by law provided for the satisfaction of mortgages and deeds in trust, by the president, any vice-president, assistant to the president, assistant vice-president, manager, credit manager, comptroller, cashier, assistant cashier, secretary, assistant secretary, treasurer, assistant treasurer, trust officer or assistant trust officer of such corporation signing the name of such corporation by him as such officer. Where mortgages or deeds in trust were marked "satisfied" on the records before the twenty-third day of February, nineteen hundred and nine, by any president, secretary, treasurer or cashier of any corporation by such officer writing his own name and affixing thereto the title of his office in such corporation, such satisfaction is validated, and is as effective to all intents and purposes as if a deed of release duly executed by such corporation had been made, acknowledged and recorded. (1909, c. 283, ss. 2, 3; C. S., s. 2597; 1935, c. 271; 1963, c. 193.)

Editor's Note.—

The 1963 amendment inserted, immediately following the words "any vice-president" in the first sentence, the words "as-

sistant to the president, assistant vice-president, manager, credit manager, comptroller."

ARTICLE 5.*Miscellaneous Provisions.***§ 45-43. Real estate mortgage loans; commissions.**

Editor's Note.—Session Laws 1959, c. 879, s. 13, effective July 1, 1960, changed the heading of article 5 from "Real Estate

Mortgage Loans" to "Miscellaneous Provisions."

§ 45-43.1. Limitations on charges for secondary mortgage residential real estate loans.—(a) No person, copartnership, association, trust, corporation or any other legal entity shall directly or indirectly charge, take or receive for a loan secured in whole or in part by a mortgage, other than a first mortgage, on residential real estate improved by the construction thereon of housing consisting of four or less family dwelling units, a rate of charge, as herein defined, excluding interest at the rate of six per cent (6%) per annum, whether payable directly to the lender or to a third party in connection with such loan, which in the aggregate is greater than ten per cent (10%) of the principal indebtedness. Provided that where the stated principal sum of the indebtedness is one thousand five hundred dollars (\$1,500.00) or less, the rate of charge may exceed said ten per cent (10%) but shall not be greater than one hundred fifty dollars (\$150.00). Provided further that the said rates of charge shall not be made more often than once each thirty-six months by a renewal or additional loan, and shall not be made a second or subsequent time on a new loan within a period of three months from the full payment and satisfaction of the original loan. The borrower shall have the right to anticipate payment of his debt in whole or in part at any time without being required to pay any prepayment or other fee to the lender. The aggregate of the amount or value actually received or held at the time of the loan, plus the sum of all existing indebtedness received of the borrower to the lender, shall be deemed the amount of the loan.

(b) The word "charge," as used in §§ 45-43.1 to 45-43.5, shall include any and every type of charge for compensation, consideration or expense, or for any other purpose whatsoever, including by whatever name called, but not by way of limitation, title searches, title reports, title opinions, title guarantees, credit reports, investigation costs, preparation of instruments, placement or discount fees, brokerage fees, recordings, appraisals, insurance of any nature except as provided in subsection "(c)" below, and closing costs, but not including interest at the lawful rate of six per cent (6%) per annum.

(c) Evidence of hazard insurance may be required by the lender of the borrower and the premium shall not be considered as a charge. Decreasing term life insurance, in an amount not exceeding the amount of the loan and for a period not ex-

ceeding the term of the loan, may also be required by the lender of the borrower but the premium therefor, if included in the loan, shall not bear interest, shall not be included in computing the rate of charge, and shall not exceed the standard rate approved by the Commissioner of Insurance for such insurance. Proof of all insurance issued in connection with loans subject to §§ 45-43.1 to 45-43.5 shall be furnished to the borrower within ten days from the date of application therefor by said borrower.

(d) No charge for or application fee may be allowed whether or not the loan is consummated.

(e) Nothing in §§ 45-43.1 to 45-43.5 shall be construed as authorizing or making lawful the charging of interest on any loan at any greater rate than six per cent (6%) per annum or the making of loans in violation of the North Carolina Consumer Finance Act (§ 53-164 et seq.). (1965, c. 1061, s. 1.)

§ 45-43.2. Discharge of loans violating §§ 45-43.1 to 45-43.5; waiver of benefits void.—(a) Any loan made in violation of §§ 45-43.1 to 45-43.5 shall be discharged upon payment or tender by the debtor, or by any person, copartnership, association, trust, corporation or any other legal entity succeeding to his interest in such real estate, of the principal sum remaining due without interest.

(b) Any agreement whereby the borrower waives the benefits of §§ 45-43.1 to 45-43.5 or releases any rights he may have acquired by virtue thereof shall be deemed to be against public policy and void. (1965, c. 1061, s. 2.)

§ 45-43.3. Itemized closing statement to be furnished.—Any person, copartnership, association, trust, corporation or any other legal entity making on its own behalf, or as agent, broker, or in other representative capacity on behalf of any other person, copartnership, association, trust, corporation, or any other legal entity, a loan or real property financing transaction within the regulatory authority of §§ 45-43.1 to 45-43.5, whether lawfully or unlawfully, at the time of the closing shall furnish the debtor or borrower or grantor in the mortgage, deed of trust or any other security instrument, a complete and itemized closing statement which shall show in detail all costs which are defined as a "charge" in § 45-43.1 (b), together with any interest charges, and the disposition of the principal of the loan or security transaction, and the said detailed closing statement shall be signed by the lending agency or a representative of the lending agency, or a responsible officer, in its behalf, and a completed and signed additional copy retained in the files of the lending agency involved and available at all reasonable times to the borrower, the borrower's successor in interest to the security real property, or the authorized agent of the borrower or the borrower's successor, until such time as the security instrument shall be satisfied in full. (1965, c. 1061, s. 3.)

§ 45-43.4. Loans exempt from §§ 45-43.1 to 45-43.5.—Sections 45-43.1 to 45-43.5 shall not apply to loans made by banks, insurance companies, or their duly designated agents compensated directly by the lender, duly licensed credit unions, production credit associations authorized by the Farm Credit Act of 1933, or savings and loan associations authorized to do business in this State, or to loans made by any other lender licensed by, and under the supervision of, the Commissioner of Banks and the State Banking Commission, under the provisions of chapter 53 of the General Statutes, or the Commissioner of Insurance, under the provisions of chapter 58 of the General Statutes. (1965, c. 1061, s. 4.)

§ 45-43.5. Violation of §§ 45-43.1 to 45-43.5 a misdemeanor.—Violation of §§ 45-43.1 to 45-43.5 is hereby made a misdemeanor punishable by fine or imprisonment, or both, in the discretion of the court. (1965, c. 1061, s. 5.)

§ 45-44. Mortgages held by insurance companies, banks, building and loan associations, or other lending institutions.—A mortgage or deed of trust held by an insurance company, bank, building and loan association, or other lending institution shall be deemed, for the purposes of any regulatory statute applicable to such institutions, to be a first lien on the property despite the existence of prior mortgages or other liens on the same property in all cases where sufficient funds for the discharge of such prior mortgages or other liens shall have been deposited with such lending institution in trust solely for such purpose. Such funds may be deposited either in cash or in obligations of the State of North Carolina or of the United States maturing in sufficient amount on or before the date or dates that the indebtedness secured by such prior mortgages or other liens is to be paid. (1957, c. 1350.)

§ 45-45. Spouse of mortgagor included among those having right to redeem real property.—Any married person has the right to redeem real property conveyed by his or her spouse's mortgages, deeds of trust and like security instruments and upon such redemption, to have an assignment of the security instrument and the uncancelled obligation secured thereby. (1959, c. 879, s. 13.)

Editor's Note.—Session Laws 1959, c. 879, s. 13, inserting this section was made effective July 1, 1960.

§ 45-45.1. Release of mortgagor by dealings between mortgagee and assuming grantee.—Except where otherwise provided in the mortgage or deed of trust or in the note or other instrument secured thereby, or except where the mortgagor, or grantor of a deed of trust otherwise consents:

- (1) Whenever real property which is encumbered by a mortgage or deed of trust is sold and the grantee assumes and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust gives the grantee a legally binding extension of time, or releases the grantee from liability on the obligation, the mortgagor or grantor of the deed of trust is released from any further liability on the obligation.
- (2) Whenever real property which is encumbered by a mortgage or deed of trust is sold and the grantee assumes and agrees to pay such mortgage or deed of trust, and thereafter the mortgagee or secured creditor under the deed of trust or trustee acting in his behalf releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater.
- (3) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust makes a binding extension of time of the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property at the time of the extension agreement.
- (4) Whenever real property which is encumbered by a mortgage or deed of trust is sold expressly subject to the mortgage or deed of trust, but the grantee does not assume the same, and thereafter the mortgagee or secured creditor under the deed of trust, or trustee acting in his behalf, releases any of the real property included in the mortgage or deed of trust, the mortgagor or grantor of the deed of trust is released to the extent of the value of the property released, which

shall be the value at the time of the release or at the time an action is commenced on the obligation secured by the mortgage or deed of trust, whichever value is the greater. (1961, c. 356.)

Editor's Note.—This section is effective as of Oct. 1, 1961.

ARTICLE 6.

Uniform Trust Receipts Act.

§ 45-46. Definitions.—In this article, unless the context or subject matter otherwise requires:

“Buyer in the ordinary course of trade” means a person to whom goods are sold and delivered for new value and who acts in good faith and without actual knowledge of any limitation on the trustee’s liberty of sale, including one who takes by conditional sale or under a pre-existing mercantile contract with the trustee to buy the goods delivered, or like goods, for cash or on credit. “Buyer in the ordinary course of trade” does not include a pledgee, a mortgagee, a lienor, or a transferee in bulk.

“Document” means any document of title to goods.

“Entruster” means the person who has or directly or by agent takes a security interest in goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. A person in the business of selling goods or instruments for profit, who at the outset of the transaction has, as against the buyer, general property in such goods or instruments, and who sells the same to the buyer on credit, retaining title or other security interest under a purchase money mortgage or conditional sales contract or otherwise, is excluded.

“Goods” means any chattels personal other than: Money, things in action, or things so affixed to land as to become a part thereof.

“Instrument” means

- (1) Any negotiable instrument as defined in the Uniform Negotiable Instruments Law and amendments thereto, or
- (2) Any certificate of stock, or bond or debenture for the payment of money issued by a public or private corporation as part of a series, or
- (3) Any interim, deposit, or participation certificate or receipt, or other credit or investment instrument of a sort marketed in the ordinary course of business or finance, of which the trustee, after the trust receipt transaction, appears by virtue of possession and the face of the instrument to be the owner.

“Instrument” does not include any document of title to goods.

“Lien creditor” means any creditor who has acquired a specific lien on the goods, documents or instruments by attachment, levy, or by any other similar operation of law or judicial process, including a distressing landlord.

“New value” includes new advances or loans made and the renewal and extension of such advances or loans or new obligations incurred, or the release or surrender of a valid and existing security interest, or the release of a claim to proceeds under G. S. 45-55.

“Person” means, as the case may be, an individual, trustee, receiver or other fiduciary, partnership, corporation, business trust, or other association, and two or more persons having a joint or common interest.

“Possession,” as used in this article with reference to possession taken or retained by the entruster, means actual possession of goods, documents or instruments, or, in the case of goods, such constructive possession as, by means of tags or signs or other outward marks placed and remaining in conspicuous places, may reasonably be expected in fact to indicate to the third party in question that the entruster has control over or interest in the goods.

“Purchase” means taking by sale, conditional sale, lease, mortgage, or pledge, legal or equitable.

"Purchaser" means any person taking by purchase. A pledgee, mortgagee or other claimant of a security interest created by contract is, insofar as concerns his specific security, a purchaser and not a creditor.

"Security interest" means a property interest in goods, documents or instruments, limited in extent to securing performance of some obligation of the trustee or of some third person to the entruster, and includes the interest of a pledgee, and title, whether or not expressed to be absolute, whenever such title is in substance taken or retained for security only.

"Transferee in bulk" means a mortgagee or a pledgee or a buyer of the trustee's business substantially as a whole.

"Trustee" means the person having or taking possession of goods, documents or instruments under a trust receipt transaction, and any successor in interest of such person. The use of the word "trustee" herein shall not be interpreted or construed to imply the existence of a trust or any right or duty of a trustee in the sense of equity jurisprudence other than as provided by this article.

"Value" means any consideration sufficient to support a simple contract. An antecedent or pre-existing claim, whether for money or not, and whether against the transferror or against another person, constitutes value where goods, documents or instruments are taken either in satisfaction thereof or as security therefor. (1961, c. 574.)

Cross Reference.—For provisions of the Uniform Commercial Code as to secured transactions and sales of accounts, contract rights and chattel paper, see §§ 25-9-101 to 25-9-507.

Editor's Note.—Section 2, c. 700, Session Laws 1965, repeals §§ 45-46 to 45-66, effective at midnight June 30, 1967.

For comment on Uniform Trust Receipts Act, see 40 N. C. Law Rev. 85.

§ 45-47. What constitutes trust receipt transaction and trust receipt.—(a) A trust receipt transaction within the meaning of this article is any transaction to which an entruster and a trustee are parties, for one of the purposes set forth in subsection (c), whereby

- (1) The entruster or any third person delivers to the trustee goods, documents or instruments in which the entruster (i) prior to the transaction has, or for new value (ii) by the transaction acquires or (iii) as the result thereof is to acquire promptly, a security interest, or
- (2) The entruster gives new value in reliance upon the transfer by the trustee to such entruster of a security interest in instruments or documents which are actually exhibited to such entruster, or to his agent in that behalf, at a place of business of either entruster or agent, but possession of which is retained by the trustee; provided, that the delivery under subdivision (1) or the giving of new value under subdivision (2) either
 - a. Be against the signing and delivery by the trustee of a writing designating the goods, documents or instruments concerned, and reciting that a security interest therein remains in or will remain in, or has passed to or will pass to, the entruster, or
 - b. Be pursuant to a prior or concurrent written and signed agreement of the trustee to give such a writing.

The security interest of the entruster may be derived from the trustee or from any other person, and by pledge or by transfer of title or otherwise.

If the trustee's rights in the goods, documents or instruments are subject to a prior trust receipt transaction, or to a prior equitable pledge, G. S. 45-54 and 45-48, respectively, of this article, determine the priorities.

(b) A writing such as is described in subsection (a), subdivision (2), paragraph a, signed by the trustee, and given in or pursuant to such a transaction, is designated in this article as a "trust receipt". No further formality of execution or authentication shall be necessary to the validity of a trust receipt.

(c) A transaction shall not be deemed a trust receipt transaction unless the

possession of the trustee thereunder is for a purpose substantially equivalent to any one of the following:

- (1) In the case of goods, documents or instruments, for the purpose of selling or exchanging them, or of procuring their sale or exchange; or
- (2) In the case of goods or documents, for the purpose of manufacturing or processing the goods delivered or covered by the documents, with the purpose of ultimate sale, or for the purpose of loading, unloading, storing, shipping, transshipping or otherwise dealing with them in a manner preliminary to or necessary to their sale; or
- (3) In the case of instruments, for the purpose of delivering them to a principal, under whom the trustee is holding them, or for consummation of some transaction involving delivery to a depositary or registrar, or for their presentation, collection, or renewal. (1961, c. 574.)

§ 45-48. Attempted creation or continuance of pledge without delivery or retention of possession.—(a) An attempted pledge or agreement to pledge not accompanied by delivery of possession, which does not fulfill the requirements of a trust receipt transaction, shall be valid as against creditors of the pledgor only as follows:

- (1) To the extent that new value is given by the pledgee in reliance thereon, such pledge or agreement to pledge shall be valid as against all creditors with or without notice, for ten days from the time the new value is given;
- (2) To the extent that the value given by the pledgee is not new value, and in the case of new value after the lapse of ten days from the giving thereof, the pledge shall have validity as against lien creditors without notice, who become such as prescribed in G. S. 45-53, only as of the time the pledgee takes possession, and without relation back.

(b) Purchasers (including entrusters) for value and without notice of the pledgor's interest shall take free of any such pledge or agreement to pledge unless, prior to the purchaser, it has been perfected by possession taken.

(c) Where, under circumstances not constituting a trust receipt transaction, a person, for a temporary and limited purpose, delivers goods, documents, or instruments, in which he holds a pledgor's or other security interest, to the person holding the beneficial interest therein, the transaction has like effect with a purported pledge for new value under this section. (1961, c. 574.)

§ 45-49. Contract to give trust receipt. — (a) A contract to give a trust receipt, if in writing and signed by the trustee, shall, with reference to goods, documents or instruments thereafter delivered by the entruster to the trustee in reliance on such contract be equivalent in all respects to a trust receipt.

(b) Such a contract shall as to such goods, documents, or instruments be specifically enforceable against the trustee; but this subsection shall not enlarge the scope of the entruster's rights against creditors of the trustee as limited by this article. (1961, c. 574.)

§ 45-50. Validity between the parties. — Between the entruster and the trustee the terms of the trust receipt shall, save as otherwise provided by this article, be valid and enforceable. But no provision for forfeiture of the trustee's interest shall be valid except as provided in subsection (e) of G. S. 45-51. (1961, c. 574.)

§ 45-51. Repossession and entruster's rights on default.—(a) The entruster shall be entitled as against the trustee to possession of the goods, documents or instruments on default, and as may be otherwise specified in the trust receipt.

(b) An entruster entitled to possession under the terms of the trust receipt

or of subsection (a) may take such possession without legal process, whenever that is possible without breach of the peace.

- (c) (1) After possession taken, the entruster shall, subject to subdivision (2) and subsection (e), hold such goods, documents or instruments with the rights and duties of a pledgee.
- (2) An entruster in possession may, on or after default, give notice to the trustee of intention to sell, and may, not less than five days after the serving or sending of such notice, sell the goods, documents or instruments for the trustee's account, at public or private sale, and may at a public sale himself become a purchaser. The proceeds of any such sale, whether public or private, shall be applied (i) to the payment of the expenses thereof, (ii) to the payment of the expenses of retaking, keeping and storing the goods, documents, or instruments, (iii) to the satisfaction of the trustee's indebtedness. The trustee shall receive any surplus and shall be liable to the entruster for any deficiency. Notice of sale shall be deemed sufficiently given if in writing, and either (i) personally served on the trustee, or (ii) sent by postpaid ordinary mail to the trustee's last known business address.
- (3) A purchaser in good faith and for value from an entruster in possession takes free of the trustee's interest, even in a case in which the entruster is liable to the trustee for conversion.

(d) Surrender of the trustee's interest to the entruster shall be valid, on any terms upon which the trustee and the entruster may, after default, agree.

(e) As to articles manufactured by style or model, the terms of the trust receipt may provide for forfeiture of the trustee's interest, at the election of the entruster, in the event of the trustee's default, against cancellation of the trustee's then remaining indebtedness; provided, that in the case of the original maturity of such an indebtedness there must be cancelled not less than eighty per cent (80%) of the purchase price to the trustee, or of the original indebtedness, whichever is greater; or, in the case of a first renewal, not less than seventy per cent (70%), or, in the case of a second or further renewal, not less than sixty per cent (60%). (1961, c. 574.)

§ 45-52. General effect of entruster's filing or taking possession.—

- (a) (1) If the entruster within the period of thirty days specified in subsection (a) of G. S. 45-53 files as in this article provided, such filing shall be effective to preserve his security interest in documents or goods against all persons save as otherwise provided by G. S. 45-53, 45-54, 45-55, 45-56, 45-59 and 45-60 of this article.
- (2) Filing after the lapse of the said period shall be valid; but in such event, save as provided in subdivision (2) of subsection (b) of G. S. 45-54, the entruster's security interest shall be deemed to be created by the trustee as of the time of such filing, without relation back, as against all persons not having notice of such interest.

(b) The taking of possession by the entruster shall, so long as such possession is retained, have the effect of filing, in the case of goods or documents; and of notice of the entruster's security interest to all persons, in the case of instruments. (1961, c. 574.)

§ 45-53. Validity against creditors.—(a) The entruster's security interest in goods, documents or instruments under the written terms of a trust receipt transaction, shall without any filing be valid as against all creditors of the trustee, with or without notice, for thirty days after delivery of the goods, documents or instruments to the trustee, and thereafter except as in this article otherwise provided.

But where the trustee at the time of the trust receipt transaction has and re-

tains instruments or documents, the thirty days shall be reckoned from the time such instruments or documents are actually shown to the entruster, or from the time that the entruster gives new value under the transaction, whichever is prior.

(b) Save as provided in subsection (a), the entruster's security interest shall be void as against lien creditors who become such after such thirty-day period and without notice of such interest and before filing.

Unless prior to the acquisition of notice by all creditors filing has occurred or possession has been taken by the entruster, (i) an assignee for the benefit of creditors, from the time of assignment, or (ii) a receiver in equity from the time of his appointment, or (iii) a trustee in bankruptcy or judicial insolvency proceedings from the time of filing of the petition in bankruptcy or judicial insolvency by or against the trustee, shall, on behalf of all creditors, stand in the position of a lien creditor without notice, without reference to whether he personally has or has not, in fact, notice of the entruster's interest. (1961, c. 574.)

§ 45-54. Limitations on entruster's protection against purchasers.—

(a) Purchasers of Negotiable Documents or Instruments.—

- (1) Nothing in this article shall limit the rights of purchasers in good faith and for value from the trustee of negotiable instruments or negotiable documents, and purchasers taking from the trustee for value, in good faith, and by transfer in the customary manner instruments in such form as are by common practice purchased and sold as if negotiable, shall hold such instruments free of the entruster's interest; and filing under this article shall not be deemed to constitute notice of the entruster's interest to purchasers in good faith and for value of such documents or instruments, other than transferees in bulk.
- (2) The entrusting (directly, by agent, or through the intervention of a third person) of goods, documents or instruments by an entruster to a trustee, under a trust receipt transaction or a transaction falling within G. S. 45-48 of this article, shall be equivalent to the like entrusting of any documents or instruments which the trustee may procure in substitution, or which represent the same goods or instruments or the proceeds thereof, and which the trustee negotiates to a purchaser in good faith and for value.

(b) Where a buyer from the trustee is not protected under subsection (a) hereof, the following rules shall govern:

(1) Sales by Trustee in the Ordinary Course of Trade.—

- a. Where the trustee, under the trust receipt transaction, has liberty of sale and sells to a buyer in the ordinary course of trade, whether before or after the expiration of the thirty-day period specified in subsection (a) of G. S. 45-53 of this article, and whether or not filing has taken place, such buyer takes free of the entruster's security interest in the goods so sold and no filing shall constitute notice of the entruster's security interest to such a buyer.
- b. No limitation placed by the entruster on the liberty of sale granted to the trustee shall affect a buyer in the ordinary course of trade, unless the limitation is actually known to the latter.

(2) Purchasers Other Than Buyers in the Ordinary Course of Trade.—In the absence of filing, the entruster's security interest in goods shall be valid, as against purchasers, save as provided in this section; but any purchaser, not a buyer in the ordinary course of trade, who, in good faith and without notice of the entruster's security interest and before filing, either (i) gives new value before the expiration of the thirty-day period specified in subsection (a) of G. S. 45-53, or (ii) gives value after said period, and who in either event before filing also obtains delivery of goods from a trustee shall hold the subject matter

of his purchase free of the entruster's security interest; but a transferee in bulk can take only under (ii) of this subdivision (2).

(3) **Liberty of Sale.**—If the entruster consents to the placing of goods subject to a trust receipt transaction in the trustee's stock in trade or in his sales or exhibition rooms, or allows such goods to be so placed or kept, such consent or allowance shall have like effect as granting the trustee liberty of sale.

(c) As to all cases covered by this section the purchase of goods, documents or instruments on credit shall constitute a purchase for new value, but the entruster shall be entitled to any debt owing to the trustee and any security therefor, by reason of such purchase; except that the entruster's right shall be subject to any setoff or defense valid against the trustee and accruing before the purchaser has actual notice of the entruster's interest. (1961, c. 574.)

§ 45-55. Entruster's right to proceeds. — Where, under the terms of the trust receipt transaction, the trustee has no liberty of sale or other disposition, or, having liberty of sale or other disposition, is to account to the entruster for the proceeds of any disposition of the goods, documents or instruments, the entruster shall be entitled, to the extent to which and as against all classes of persons as to whom his security interest was valid at the time of disposition by the trustee, as follows:

- (1) To the debts described in G. S. 45-54 (c); and also
- (2) To any proceeds; or the value of any proceeds (whether such proceeds are identifiable or not) of the goods, documents or instruments, if said proceeds were received by the trustee within thirty days prior to either application for appointment of a receiver of the trustee, or the filing of a petition in bankruptcy or judicial insolvency proceedings by or against the trustee, or demand made by the entruster for prompt accounting; and to a priority to the amount of such proceeds or value; and also
- (3) To any other proceeds of the goods, documents or instruments which are identifiable. (1961, c. 574.)

§ 45-56. Liens in course of business good against entruster. — Specific liens arising out of contractual acts of the trustee with reference to the processing, warehousing, shipping or otherwise dealing with specific goods in the usual course of the trustee's business preparatory to their sale shall attach against the interest of the entruster in said goods as well as against the interest of the trustee, whether or not filing has occurred under this article; but this section shall not obligate the entruster personally for any debt secured by such lien; nor shall it be construed to include the lien of a landlord. (1961, c. 574.)

§ 45-57. Entruster not responsible on sale by trustee. — An entruster holding a security interest shall not, merely by virtue of such interest or of his having given the trustee liberty of sale or other disposition, be responsible as principal or as vendor under any sale or contract to sell made by the trustee. (1961, c. 574.)

§ 45-58. Filing and refiling concerning trust receipt transaction covering documents or goods.—(a) Any entruster undertaking or contemplating trust receipt transactions with reference to documents or goods is entitled to file a statement, signed by the entruster and the trustee and acknowledged by the trustee before an officer authorized to take acknowledgments, and probated as other instruments are now probated, which shall contain:

- (1) The name and mailing address within this State of both entruster and trustee, or if either the entruster or trustee has no mailing address within the State, the mailing address outside the State; and
- (2) A statement that the entruster is engaged, or expects to be engaged, in

financing under trust receipt transactions the acquisition of goods by the trustee; and

(3) A description of the kind or kinds of goods covered or to be covered by such financing.

(b) The following form of statement (or any other form of statement containing substantially the same information) shall suffice for the purposes of this article.

Statement of Trust Receipt Financing

The entruster, whose mailing address within this State is, [or who has no place of business within this State and whose mailing address outside this State is] is or expects to be engaged in financing under trust receipt transactions the acquisition by the trustee, whose mailing address within this State is of goods of the following description: [coffee, silk, automobiles, or the like.]

[Signed] Entruster
 [Signed] Trustee.

(c) The place for filing the statement of trust receipt financing shall be the office of the register of deeds of the county wherein the trustee, if an individual, resides; or if the trustee is a domestic or domesticated corporation which has a registered office in this State, the statement of trust receipt financing must be filed in the county wherein such registered office is located; or if the corporation has no such registered office in this State but does have a principal office in this State as shown by its certificate of incorporation or amendment thereto or legislative charter or, in case of a domesticated corporation, as shown by its statement filed with the Secretary of State, the statement of trust receipt financing must be filed in the county wherein the principal office is said to be located by such certificate of incorporation or amendment thereto or legislative charter or such statement filed with the Secretary of State. If the trustee is a resident or nonresident firm, partnership, association or a nonresident individual or a foreign undomesticated corporation, then the statement of trust receipt financing shall be filed in the office of the register of deeds of any county wherein the trustee has a place of business.

(d) Presentation for filing of the statement described in subsection (a), and payment of the filing fee, shall constitute filing under this article, in favor of the entruster, as to any documents, or goods falling within the description in the statement which are within one year from the date of such filing, or have been, within thirty days previous to such filing, the subject matter of a trust receipt transaction between the entruster and the trustee.

(e) At any time before expiration of the validity of the filing, as specified in subsection (d), a like statement, as specified in subsection (a), or an acknowledged and probated affidavit by the entruster alone, setting out the information required by subsection (a) and containing the book and page where the original statement is recorded, may be filed in like manner as the original filing. Any filing of such further statement or affidavit shall be valid in like manner and for like period as an original filing, and shall also continue the rank of the entruster's existing security interest as against all junior interests.

(f) The register of deeds shall index and record each statement of trust receipt financing, or extension statement, in the same manner as chattel mortgages; and for indexing and recording the same, the register of deeds shall receive the same fee as is provided by law for the recording and indexing of short form chattel mortgages.

(g) The statement of trust receipt financing may be cancelled of record at any time by the entruster or by his duly authorized attorney in fact, or upon presentation by the trustee or the entruster of the original statement of trust receipt financing marked satisfied in full by the entruster but such cancellation shall not affect the protection afforded to trust receipts protected by other filings or by other

provisions of this article. The cancellation of the original statement of trust receipt financing shall operate as a cancellation of all extensions of that statement. (1961, c. 574.)

§ 45-59. Limitations on extent of obligation secured. — As against purchasers and creditors, the entruster's security interest may extend to any obligation for which the goods, documents or instruments were security before the trust receipt transaction, and to any new value given or agreed to be given as a part of such transaction; but not, otherwise, to secure past indebtedness of the trustee; nor shall the obligation secured under any trust receipt transaction extend to obligations of the trustee to be subsequently created. (1961, c. 574.)

§ 45-60. Article not applicable to certain transactions. — This article shall not apply to single transactions of legal or equitable pledge, not constituting a course of business, whether such transactions be unaccompanied by delivery of possession, or involve constructive delivery, or delivery and redelivery, actual or constructive, so far as such transactions involve only an entruster who is an individual natural person, and a trustee entrusted as a fiduciary with handling investments or finances of the entruster; nor shall it apply to transactions of bailment or consignment in which the title of the bailor or consignor is not retained to secure an indebtedness to him of the bailee or consignee. (1961, c. 574.)

§ 45-61. Election among filing statutes. — As to any transaction falling within the provisions both of this article and of any other act or law requiring or permitting filing or recording, the entruster shall not be required to comply with both, but by complying with the provisions of either at his election may have the protection given by the act complied with; except that buyers in the ordinary course of trade as described in subsection (b) of G. S. 45-54, and lienors as described in G. S. 45-56, shall be protected as therein provided, although the compliance of the entruster be with the filing or recording provisions of another act or law. (1961, c. 574.)

§ 45-62. Cases not provided for. — In any case not provided for in this article the rules of law and equity, including the law merchant, shall continue to apply to trust receipt transactions and purported pledge transactions not accompanied by delivery of possession. (1961, c. 574.)

§ 45-63. Uniformity of interpretation. — This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it. (1961, c. 574.)

§ 45-64. Constitutionality. — If any provision of this article or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the article which can be given effect without the invalid provision or application, and to this end the provisions of this article are declared to be severable. (1961, c. 574.)

§ 45-65. Short title. — This article may be cited as the Uniform Trust Receipts Act. (1961, c. 574.)

§ 45-66. Inconsistent laws. — Notwithstanding the provisions of any general or special law, the provisions of this article shall control; provided, however, that this article shall not affect transactions entered into before June 1, 1961. (1961, c. 574.)

Chapter 46.

Partition.

Article 1.

Partition of Real Property.

Sec.

- 46-3. Petition by cotenant or personal representative of cotenant.
- 46-14. Judgments in partition of remainder binding on parties thereto.
- 46-15. [Repealed.]

Sec.

- 46-20. Report and confirmation enrolled and registered; effect; probate.

Article 4.

Partition of Personal Property.

- 46-43.1. Confirmation; impeachment.

ARTICLE 1.

Partition of Real Property.

§ 46-1. Partition is a special proceeding.

Partition Regulated by Statute.—Since 1868 the partition of land between tenants in common has been regulated by statute. *Allen v. Allen*, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Procedure Prescribed for Special Proceedings Applies.—A proceeding for partition of real or personal property is a special proceeding of which the clerk has jurisdiction under procedure in all respects the same as that prescribed by law in special proceedings except as modified by this chapter. *Dubose v. Harpe*, 239 N. C. 672, 80 S. E. (2d) 454 (1954).

Proceedings Are Equitable in Nature.—

§ 46-2. Venue in partition.

Venue of Proceeding to Partition Property.—See note to § 46-42.

§ 46-3. Petition by cotenant or personal representative of cotenant.

—One or more persons claiming real estate as joint tenants or tenants in common or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G. S. 28-81, may have partition by petition to the superior court. (1868-9, c. 122, s. 1; Code, s. 1892; Rev., s. 2487; C. S., s. 3215; 1963, c. 291, s. 2.)

I. IN GENERAL.

Editor's Note. — The 1963 amendment inserted the words "or the personal representative of a decedent joint tenant, or tenant in common, when sale of such decedent's real property to make assets is alleged and shown as required by G. S. 28-81."

Tenancy in common in land is necessary basis for maintenance of special proceeding for partition by petition to the superior court. *Murphy v. Smith*, 235 N. C. 455, 70 S. E. (2d) 697 (1952).

A tenancy in common is the foundation upon which partition is based. *Smith v. Smith*, 248 N. C. 194, 102 S. E. (2d) 868 (1958).

Partition proceedings have been consistently held to be equitable in nature. *Allen v. Allen*, 263 N. C. 496, 139 S. E. 2d 585 (1965).

A tenancy in common is the foundation upon which partition is based. *Smith v. Smith*, 248 N. C. 194, 102 S. E. (2d) 868 (1958).

Applied in *Davis v. Griffin*, 249 N. C. 26, 105 S. E. (2d) 119 (1958).

Cited in *King v. Neese*, 233 N. C. 132, 63 S. E. (2d) 123 (1951); *Murphy v. Smith*, 235 N. C. 455, 70 S. E. (2d) 697 (1952); *Nunn v. Gibbons*, 249 N. C. 362, 106 S. E. (2d) 499 (1959).

Tenant in Common Is Entitled to Partition as Matter of Right. A tenant in common is entitled as a matter of right to partition of real estate held in common, to the end that he may have and enjoy his share therein in severalty. *Davis v. Griffin*, 249 N. C. 26, 105 S. E. (2d) 119 (1958); *Brown v. Boger*, 263 N. C. 248, 139 S. E. 2d 577 (1965).

Right as Against Persons Having Contingent Remainders in Undivided Interests in Land. Petitioners, owning undivided interest in fee in several tracts of land and also owning life estates in the balance of the undivided interests in the same tracts of land with contingent limitations over to persons not presently de-

terminable, had the right, as against the contingent remaindermen, to partition the several tracts so that petitioners might hold some of the tracts in fee and in common, and thus know the boundaries of the real estate owned by them in fee distinct from the boundaries of that in which they owned life estates with contingent remainder over. *Davis v. Griffin*, 249 N.C. 26, 105 S.E. (2d) 119 (1958).

Partition of Part—Inclusion of, etc.—

In accord with original. See *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964); *Coats v. Williams*, 261 N.C. 692, 136 S.E.2d 113 (1964).

Partition in Kind Is Favored.—Since partition in kind is favored, such partition will be ordered, even though there may be some slight disadvantages in pursuing such method. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

But Right May Not Be Used to Injure Another.—Partition of land in kind is a matter of right, but this right of actual partition may not be so used as to injure another. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

There should be a partition in kind unless such partition will cause material and substantial injury to some or all of the parties interested. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

§ 46-7. Commissioners appointed.

Applied in *Allen v. Allen*, 258 N.C. 305, 128 S.E. (2d) 385 (1962).

§ 46-7 1. Compensation of commissioners.—The clerk of the superior court shall fix the compensation of commissioners for the partition or division of lands according to the provisions of G.S. 1-408 (1949, c. 975; 1953, c. 48.)

Local Modification.—Guilford: 1951, c. 977, s. 1; Harnett: 1951, c. 1170; Stokes: 1959, c. 531.

Editor's Note. — Prior to the 1953

Whether Partition or Sale, etc.—

Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Test Is Whether Value of Share Would Be Materially Less on Partition Than on Sale.—The test of whether a partition in kind would result in great prejudice to the cotenant owners is whether the value of the share of each in case of a partition would be materially less than the share of each in the money equivalent that could probably be obtained for the whole. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Determinative Circumstances.—On the question of partition or sale, the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

The physical difficulty of division is only a circumstance for the consideration of the court. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

§ 46-10. Commissioners to meet and make partition; equalizing shares.

Actual partition must be on the basis of the division made by commissioners and not otherwise. *Allen v. Allen*, 258 N.C. 305, 128 S.E. (2d) 385 (1962).

Authority of Commissioners and Effect of Partition.—In partition proceedings the duty of the commissioners is to make actual partition among the tenants in common and to make a full report thereof; they have no other function. The allotment of the respective shares in partition proceedings creates no new estate and

conveys no title, the sole effect thereof being to sever the unity of possession and to fix the physical boundaries of the tracts. Therefore, no title vests in the commissioners, and after confirmation of their report they have no further authority and purported deeds executed by them to the several tenants convey nothing. *McLamb v. Weaver*, 244 N.C. 432, 94 S.E. (2d) 331 (1956).

Cited in *Thompson v. Thompson*, 235 N.C. 416, 70 S.E. (2d) 495 (1952).

§ 46-14. Judgments in partition of remainders binding on parties thereto.—Where land is conveyed by deed, or devised by will, upon contingent

remainder, executory devise, or other limitation, any judgment of partition rendered in an action or special proceeding in the superior court authorizing a division or partition of said lands, and to which the life tenant or tenants, and all other persons then in being, or not in being, take such land as if the contingency had then happened, are parties, and those unborn being duly represented by guardian ad litem, such judgment of partition authorizing division or partition of said lands among the respective tenants and remainders or executory devisees, will be valid and binding upon all parties thereto and upon all other persons not then in being. (1933, c. 215, s. 1; 1959, c. 1274, s. 1.)

Editor's Note.—The 1959 amendment rewrote this section. Section 2 of the amendatory act provides that all judgments of partition heretofore rendered by the superior court under the provisions of

G. S. 46-14 prior to June 20, 1959, are hereby ratified, confirmed and validated.

Cited in Barnes v. Dortch, 245 N. C. 369, 95 S. E. (2d) 872 (1957).

§ 46-15: Repealed by Session Laws 1959, c. 879, s. 14, effective July 1, 1960.

Intestate Succession Law.—For new Intestate Succession Law, effective July 1, 1960, see §§ 29-1 to 29-30.

§ 46-16. Partial partition; balance sold or left in common.

Section Inapplicable Where Parties Agree Entire Tract Can Be Partitioned.—Where all parties agree that the entire tract can be partitioned without injury to

any of the parties in interest, the provisions of this section and § 46-22 are not applicable to the proceeding. Horne v. Horne, 261 N.C. 688, 136 S.E.2d 87 (1964).

§ 46-17. Report of commissioners; contents; filing.

Cross Reference.—See note to § 46-10.

The mere fact that the commissioners did not file their report within the statutory period of sixty days after notification does not vitiate the report or preclude confirmation. Thompson v. Thompson, 235 N. C. 416, 70 S. E. (2d) 495 (1952).

Commissioners Not Required to Hear

Tenants in Common.—There is no statutory requirement that commissioners appointed to partition land shall hear and consider evidence offered by the tenants in common or their contentions prior to or at the time of making partition. Allen v. Allen, 263 N.C. 496, 139 S.E.2d 585 (1965).

§ 46-18. Map embodying survey to accompany report.

Quoted in Allen v. Allen, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

§ 46-19. Confirmation and impeachment of report.

Proceedings Interlocutory until Confirmation.—

All orders of the clerk or judge are interlocutory except a final judgment or decree confirming the report of the commissioners. Allen v. Allen, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Confirmation Is for Determination by Clerk and Judge.—If exceptions are filed in apt time, whether the report of the commissioners should be confirmed is for determination by the clerk and, upon appeal from his order, by the judge. Allen v. Allen, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Clerk Has Jurisdiction Initially to Pass upon Exceptions.—Clearly, the clerk has authority and jurisdiction, initially, to pass upon exceptions to the report of the com-

missioners in a special proceeding for partition. Allen v. Allen, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Powers of Clerk in Hearing on Exceptions.—In a hearing on exceptions to the report of the commissioners the clerk may (1) recommit the report for correction or further consideration, or (2) vacate the report and direct a reappraisal by the same commissioners, or (3) vacate the report, discharge the commissioners, and appoint new commissioners to view the premises and make partition thereof. Allen v. Allen, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

The clerk is without authority to alter the report filed either by changing the division lines or by enlarging or decreasing the owelty charge assessed by the commis-

sioners. *Allen v. Allen*, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Nor May Judge Order Partition Different from That Made by Commissioners.—The judge may not, based on his findings as to what would constitute an equitable division, adjudge a partition of the land different from that made by the commissioners. *Allen v. Allen*, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

He May Confirm Report or Vacate It and Enter Appropriate Interlocutory Orders.—In a de novo hearing before the judge, where the question is whether the report of the commissioners should be confirmed, the judge may confirm or he may vacate and enter appropriate interlocutory orders. *Allen v. Allen*, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Where the clerk had confirmed the report of the commissioners, the question before the judge was whether the division made by the commissioners was fair and equitable. If so, a final judgment or decree confirming the report of the commissioners should have been entered. If not, the report of the commissioners should have been

set aside; and, if set aside, the court by interlocutory order, should have ordered a new division by commissioners or, if the facts justified, a partition sale. *Allen v. Allen*, 258 N. C. 305, 128 S. E. (2d) 385 (1962).

Confirmation Is Error Where Commissioners Fail to Carry Out Orders.—Where commissioners fail to carry out the orders of the court in some material respect, it is error to confirm their report, especially if it appears that a party or parties have probably suffered injury by reason of such failure. *Allen v. Allen*, 263 N.C. 496, 139 S.E.2d 585 (1965).

Effect of Findings of Judge.—Where an actual partition of lands has been ordered, whether the division made by the commissioners was fair and equitable or unequal in value is a question of fact to be determined by the judge of the superior court upon an appeal from a judgment of the clerk affirming the report of commissioners, and the findings of the judge are conclusive and binding if there is any evidence in the record to support them. *West v. West*, 257 N. C. 760, 127 S. E. (2d) 531 (1962).

§ 46-20. Report and confirmation enrolled and registered; effect; probate.—Such report, when confirmed, together with the decree of confirmation, shall be enrolled and certified to the register of deeds and registered in the office of the county where such real estate is situated, and shall be binding among and between the claimants, their heirs and assigns. It shall not be necessary for the clerk of court to probate the certified papers required to be registered by this section. (1868-9, c. 122, s. 6; Code, s. 1897; Rev., s. 2495; C. S., s. 3231; 1965, c. 804.)

Editor's Note. — The 1965 amendment added the second sentence.

ARTICLE 2.

Partition Sales of Real Property.

§ 46-22. Sale in lieu of partition.

Tenants in common are entitled to actual partition, etc.—

In accord with original. See *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964). And see *Seawell v. Seawell*, 233 N. C. 735, 65 S. E. (2d) 369 (1951).

Tenants in common are entitled as a matter of right to partition or to a partition sale if actual partition cannot be made without injury to some of the tenants. *Coats v. Williams*, 261 N.C. 692, 136 S.E.2d 113 (1964), citing *Batts v. Gaylord*, 253 N.C. 181, 116 S.E.2d 424 (1960).

Section Is Inapplicable Where Parties Agree Partition Can Be Made.—Where all parties agree that the entire tract can be partitioned without injury to any of the parties in interest, the provisions of § 46-16 and this section are not applicable to the

proceeding. *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964).

A sale will not be ordered merely for the convenience of one of the cotenants. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

In the absence of any allegation, proof or finding that an actual partition cannot be had without injury to some or all of the parties, the court has no jurisdiction to order a sale. *Seawell v. Seawell*, 233 N. C. 735, 65 S. E. (2d) 369 (1951).

The court has no authority to order a sale of land for partition without satisfactory proof of facts showing that an actual partition will cause injury to some or all of the cotenants. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Issues and Questions, etc.—

Whether land should be divided in kind or sold for partition is a question of fact for decision of the clerk of superior court, subject to review by the judge on appeal; it is not an issue of fact for a jury. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

The burden is on the party seeking sale, etc.—

In accord with original. See *Seawell v. Seawell*, 233 N.C. 735, 65 S.E. (2d) 369 (1951).

The burden is upon those alleging the necessity and desirability of a sale to establish the necessary requisites. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

By "injury" to a cotenant is meant substantial injustice or material impairment of his rights or position, such that it would be unconscionable to require him to submit to actual partition. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Test Is Whether Value of Share Would Be Materially Less on Partition Than on Sale.—The test of whether a partition in kind would result in great prejudice to the cotenant owners is whether the value of the share of each in case of a partition would be materially less than the share of

§ 46-23. Remainder or reversion estate.

Partition a Matter of Right.—The remainderman petitioner is entitled to partition as a matter of right, unless actual partition cannot be made without injury to some or all of the parties interested. In that case, he is entitled to sale for partition. *Richardson v. Barnes*, 238 N.C. 398, 77 S.E. (2d) 925 (1953).

The existence of a life estate, even though it be in favor of one of the tenants in common, does not preclude partition of the remainder among the tenants in common. *Smith v. Smith*, 248 N.C. 194, 102 S.E. (2d) 868 (1958).

Vested Remainderman Entitled to Partition.—Since the enactment of this

§ 46-24. Life tenant as party; valuation of life estate.

Life Tenant May Not Maintain Proceedings against Remaindermen.—Life tenants are not tenants in common with remaindermen, and may not maintain partition proceedings against the tenants in

§ 46-30. Deed to purchaser; effect of deed.

Liens against Interest of Tenant in Common.—The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances exist there-

each in the money equivalent that could probably be obtained for the whole. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Determinative Circumstances.—On the question of partition or sale the determinative circumstances usually relate to the land itself, and its location, physical condition, quantity, and the like. *Brown v. Boger*, 263 N.C. 248, 139 S.E.2d 577 (1965).

Holders of Judgment Liens Not Necessary Parties.—The holders of judgment liens on land sought to be partitioned or on undivided interests in such land are not necessary parties to a proceeding to partition the land by sale. *Washburn v. Washburn*, 234 N.C. 370, 67 S.E. (2d) 264 (1951).

Claims Must Be Determined Before Distribution Ordered.—A defendant who asserted his claims before an order of distribution was made, was entitled as a matter of right to have his claims determined before an order of distribution of the proceeds of the sale was entered. *Roberts v. Barlowe*, 260 N.C. 239, 132 S.E.2d 483 (1963).

Applied in *Clapp v. Clapp*, 241 N.C. 281, 85 S.E. (2d) 153 (1954).

sold for partition; outstanding life

section, the owner of a fee or vested remainder in real estate as a joint tenant, or tenant in common, is entitled to a partition of the land or sale for partition of the remainder or reversion thereof. But such partition or sale of a vested remainder in real estate shall not interfere with the possession of the life tenant during the existence of his estate. *Bunting v. Cobb*, 234 N.C. 132, 66 S.E. (2d) 661 (1951).

Applied in *Davis v. Griffin*, 249 N.C. 26, 105 S.E. (2d) 119 (1958); *Miller v. McLean*, 252 N.C. 171, 113 S.E. (2d) 359 (1960); *Horne v. Horne*, 261 N.C. 688, 136 S.E.2d 87 (1964).

common in the remainder.

Richardson v. Barnes, 238 N.C. 398, 77 S.E. (2d) 925 (1953).

Applied in *Davis v. Griffin*, 249 N.C. 26, 105 S.E. (2d) 119 (1958).

on, and cannot have the proceeds of sale applied to discharge such liens. *Jordan v. Faulkner*, 168 N.C. 466, 84 S.E. 764 (1915).

When Judgment Creditor Not Made Party. — Where judgment creditors of a tenant in common are not made parties to a partition proceeding, the purchaser

buys subject to their liens. *Holley v. White*, 172 N. C. 77, 89 S. E. 1061 (1916). See *Washburn v. Washburn*, 234 N. C. 370, 67 S. E. (2d) 264 (1951).

§ 46-33. Shares in proceeds to

Judgment Creditors Not Entitled to Apply for Share of Proceeds. — Since they are in no wise affected by the partition sale, judgment creditors, who are not parties to the partition proceeding, have no right to apply to the court after final decree to have their debtor's share of the proceeds paid to them. Moreover,

cotenants secured.

they cannot be permitted to intervene for such purpose after the officer or person making the partition sale has put an end to the proceeding by disposing of the proceeds of sale in conformity with the final decree. *Washburn v. Washburn*, 234 N. C. 370, 67 S. E. (2d) 264 (1951).

ARTICLE 4.

Partition of Personal Property.

§ 46-42. Personal property may be partitioned; commissioners appointed.

Venue.—A proceeding for the partition of personal property is the sole remedy of a tenant in common to obtain possession as against a cotenant, and therefore it is governed by the provisions of § 1-76 (4), making the venue the county in which the

property sought to be partitioned is located, and not the county of the residence of the petitioner or respondent. *Dubose v. Harpe*, 239 N. C. 672, 80 S. E. (2d) 454 (1954).

§ 46-43.1. Confirmation; impeachment.—If no exception to the report of the commissioners making partition is filed within ten days the report shall be confirmed. Any party, after confirmation, shall be allowed to impeach the proceeding for mistake, fraud or collusion, by petition in the cause, but innocent purchasers for full value and without notice shall not be affected thereby. (1953, c. 24.)

Editor's Note.—The act inserting this section became effective July 1, 1953.

For brief comment on this section, see 31 N. C. Law Rev. 428.

§ 46-44. Sale of personal property on partition.

Cited in *Bullman v. Edney*, 232 N. C. 465, 61 S. E. (2d) 338 (1950).

Chapter 47.

Probate and Registration.

Article 1.

Probate.

Sec.

- 47-12. Proof of attested instrument by subscribing witness.
- 47-12.1. Proof of attested instrument by proof of handwriting.
- 47-12.2. Subscribing witness incompetent when grantee or beneficiary.
- 47-13.1. Certificate of officer taking proof of instrument.
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Article 2.

Registration.

- 47-17.1. Documents accepted for probate or

Sec.

- recordation in certain counties to designate draftsman; exceptions.
- 47-19. Unregistered deeds prior to January, 1920, registered on affidavit.
- 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.
- 47-20.1. Place of registration; real property.
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Sec.

47-20.4. Place of registration; chattel real.
 47-23. [Repealed.]
 47-30. Plats and subdivisions; mapping requirements.
 47-30.1. Plats and subdivisions; alternative requirements.
 47-32. Photographic copies of plats, etc.; fees of clerk.
 47-32.1. Photostatic copies of plats, etc.; fees of clerk; alternative provisions.
 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor.

Article 3.**Forms of Acknowledgment, Probate and Order of Registration.**

47-42. Attestation of bank conveyances by secretary or cashier.
 47-43.2. Officer's certificate upon proof of instrument by subscribing witness.
 47-43.3. Officer's certificate upon proof of instrument by proof of signature of maker.
 47-43.4. Officer's certificate upon proof of instrument by proof of signature of subscribing witness.

Article 4.**Curative Statutes; Acknowledgments; Probates; Registration.**

47-53.1. Acknowledgment omitting seal of notary public.
 47-54. Registration by register's deputies or clerks.
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 47-85.1. Further as to acknowledgments, etc., before masters in chancery.
 47-94. Acknowledgment and registration by officer or stockholder in building and loan or savings and loan association.

Sec.

47-97.1. Validation of corporate deeds containing error in acknowledgment or probate.
 47-108.10. Validation of registration of plats upon probate in accordance with § 47-30.
 47-108.11. Validation of recorded instruments where seals have been omitted.
 47-108.12. Validation of instruments acknowledged before United States commissioners.
 47-108.13. Validation of certain instruments registered prior to January 1, 1934.
 47-108.14. Conveyances by the United States acting by and through the General Services Administration.
 47-108.15. Validation of registration of instruments filed before order of registration.
 47-108.16. Validation of certain deeds executed by nonresident banks.

Article 6.**Execution of Powers of Attorney.**

47-115.1. Appointment of attorney in fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.

Article 7.**Private Examination of Married Women Abolished.**

47-116. [Transferred.]

Article 8.**Memoranda of Leases and Options.**

47-117. Forms do not preclude use of others; adaptation of forms.
 47-118. Forms of registration of lease.
 47-119. Form of memorandum for option to purchase real estate.
 47-120. Memorandum as notice.

ARTICLE 1.*Probate.*

§ 47-1. Officials of State authorized to take probate.—The execution of all deeds of conveyance, contracts to buy, sell or convey lands, mortgages, deeds of trust, instruments modifying or extending the terms of mortgages or deeds of trust, assignments, powers of attorney, covenants to stand seized to the use of another, leases for more than three years, releases, affidavits concerning land titles or family history, any instruments pertaining to real property, and any and all instruments and writings of whatever nature and kind which are required or allowed by law to be registered in the office of the register of deeds or which may

hereafter be required or allowed by law to be so registered, may be proved or acknowledged before any one of the following officials of this State: The several Justices of the Supreme Court, the several judges of the superior court, commissioners of affidavits appointed by the Governor of this State, the Clerk of the Supreme Court, the several clerks of the superior court, the deputy clerks of the superior court, the several clerks of the criminal courts, notaries public, and the several justices of the peace. (Code, s. 1246; 1895, c. 161, ss. 1, 3; 1897, c. 87; 1899, c. 235; Rev., s. 989; C. S., s. 3293; 1951, c. 772.)

Editor's Note. — The 1951 amendment rewrote this section.

Registration of improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. *New Home Bldg. Supply Co., Inc. v. Nations*, 259 N. C. 681, 131 S. E. (2d) 425 (1963).

A timber deed in regular form, having a valid assignment of the timber rights by the grantee in the deed endorsed on its back, was duly registered, and the endorsement was transcribed on the records with the deed. Held: Even though the endorsement was sufficient as a conveyance of the timber rights, the endorsement was not

acknowledged, and therefore there was no registration of the endorsement so as to defeat the rights of the creditors of the grantee in the deed. *New Home Bldg. Supply Co., Inc. v. Nations*, 259 N. C. 681, 131 S. E. (2d) 425 (1963).

Applied in *Clark v. Butts*, 240 N. C. 709, 83 S. E. (2d) 885 (1954); *Baker v. Murphrey*, 254 N. C. 506, 119 S. E. (2d) 398 (1961).

Cited in *Beck v. Voncannon*, 237 N. C. 707, 75 S. E. (2d) 895 (1953); *Phillips v. Gilbert*, 248 N. C. 183, 102 S. E. (2d) 771 (1958); *Baker v. Murphrey*, 250 N. C. 346, 108 S. E. (2d) 644 (1959).

§ 47-2. Officials of the United States, foreign countries, and sister states. — The execution of all such instruments and writings as are permitted or required by law to be registered may be proved or acknowledged before any one of the following officials of the United States, of the District of Columbia, of the several states and territories of the United States, of countries under the dominion of the United States and of foreign countries: Any judge of a court of record, any clerk of a court of record, any notary public, any commissioner of deeds, any commissioner of oaths, any mayor or chief magistrate of an incorporated town or city, any ambassador, minister, consul, vice-consul, consul general, vice-consul general, or commercial agent of the United States, any justice of the peace of any state or territory of the United States, any officer of the army or air force of the United States or United States marine corps having the rank of warrant officer or higher, any officer of the United States navy or coast guard having the rank of warrant officer, or higher, or any officer of the United States merchant marine having the rank of warrant officer, or higher. No official seal shall be required of said military, naval or merchant marine official, but he shall sign his name, designate his rank, and give the name of his ship or military organization and the date, and for the purpose of certifying said acknowledgment, he shall use a form in substance as follows:

On this the day of, 19.... before me, the undersigned officer, personally appeared known to me (or satisfactorily proven) to be accompanying or serving in or with the armed forces of the United States and to be the person whose name is subscribed to the within instruments and acknowledged that he executed the same for the purposes therein contained. And the undersigned does further certify that he is at the date of this certificate a commissioned officer of the rank stated below and is in the active service of the armed forces of the United States.

.....
Signature of Officer

.....
Rank of Officer and command to which attached.

(1955, c. 658, s. 1; 1957, c. 1084, s. 1.)

Editor's Note.—The 1955 amendment substituted "warrant officer" for "second lieutenant" or "ensign" in the first paragraph. It also inserted the words "accompanying or" before "serving" in line three of the second paragraph. The 1957 amendment inserted the words "or air force" after the word "army" in line ten of the first paragraph. As the last paragraph was not changed it is not set out.

Validation of writing acknowledged before warrant officer, etc.—

Session Laws 1955, c. 658, s. 2, provided: Any instrument or writing, required by law to be proved or acknowledged, which prior to April 21, 1955, was proved or acknowledged before an officer of the United

States army, United States air force or United States marine corps having the rank of warrant officer or higher, or any officer of the United States navy, United States coast guard, or United States merchant marine, having the rank of warrant officer or higher, is hereby validated and declared sufficient for all purposes.

Session Laws 1957, c. 1084, s. 2, provided that any instrument or writing required by law to be proved or acknowledged, which prior to June 5, 1957, was proved or acknowledged before an officer of the air force of the United States, is hereby validated and declared sufficient for all purposes.

§ 47-12. Proof of attested instrument by subscribing witness.—Except as provided by G. S. 47-12.2, the execution of any instrument required or permitted by law to be registered, which has been witnessed by one or more subscribing witnesses, may be proved for registration before any official authorized by law to take proof of such an instrument, by a statement under oath of any such subscribing witness that the maker either signed the instrument in his presence or acknowledged to him the execution thereof. Nothing in this section in anywise affects any of the requirements set out in G. S. 52-12. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1; 1953, c. 1078, s. 1.)

Editor's Note.—The 1951 amendment struck out former § 47-12 and inserted in lieu thereof this and the two following sections.

The 1953 amendment, effective July 1, 1953, added at the end of the first sentence the words "that the maker either signed the instrument in his presence or acknowledged to him the execution thereof."

For brief comment on the 1951 act, see 29 N. C. Law Rev. 411.

Registration of improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. New Home Bldg. Supply Co., Inc. v. Nations, 259 N. C. 681, 131 S. E. (2d) 425 (1963).

Applied in Clark v. Butts, 240 N. C. 709, 83 S. E. (2d) 885 (1954).

§ 47-12.1. Proof of attested instrument by proof of handwriting.—(a) If all subscribing witnesses have died or have left the State or have become of unsound mind or otherwise incompetent or unavailable, the execution of such instrument, except as provided by G. S. 47-12.2, may be proved for registration, before any official authorized by law to take proof of such an instrument, by a statement under oath that the affiant knows the handwriting of the maker and that the purported signature of the maker is in the handwriting of the maker, or by a statement under oath that the affiant knows the handwriting of a particular subscribing witness and that the purported signature of such subscribing witness is in the handwriting of such subscribing witness.

(b) Nothing in this section in anywise affects any of the requirements set out in G. S. 52-12. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1.)

Cross Reference.—See note under § 47-12.

§ 47-12.2. Subscribing witness incompetent when grantee or beneficiary.—The execution of an instrument may not be proved for registration by a subscribing witness who is the grantee or beneficiary therein nor by proof of his signature as such subscribing witness. Nothing in this section invalidates the reg-

istration of any instrument registered prior to April 9, 1935. (1899, c. 235, s. 12; Rev., s. 997; C. S., s. 3303; 1935, c. 168; 1937, c. 7; 1945, c. 73, s. 11; 1947, c. 991, s. 1; 1949, c. 815, ss. 1, 2; 1951, c. 379, s. 1.)

Cross Reference.—See note under § 47-12.

§ 47-13. Proof of unattested writing.

Registration of improperly acknowledged or defectively probated deed imports no constructive notice and the deed will be treated as if unregistered. New Home Bldg. Supply Co., Inc. v. Nations, 259 N. C. 681, 131 S. E. (2d) 425 (1963).

§ 47-13.1. Certificate of officer taking proof of instrument.—The person taking proof of an instrument pursuant to G. S. 47-12, 47-12.1 or 47-13 shall execute a certificate on or attached to the instrument being proved, certifying to the fact of proof substantially as provided in the certificate forms set out in G. S. 47-43.2, 47-43.3 and 47-43.4, and such certificate shall be prima facie evidence of the facts therein certified. (1951, c. 379, s. 2; 1953, c. 1078, s. 2.)

Editor's Note. — The 1953 amendment, effective after July 1, 1953, inserted the words "substantially as provided in the

certificate forms set out in G. S. 47-43.2, 47-43.3 and 47-43.4."

§ 47-14.1. Repeal of laws requiring private examination of married women.—All deeds, contracts, conveyances, leaseholds or other instruments executed from and after the ratification of this section shall be valid for all purposes without the separate, privy, or private examination of a married woman where she is a party to or a grantor in such deed, contract, conveyance, leasehold or other instrument, and it shall not be necessary nor required that the separate or privy examination of such married woman be taken by the certifying officer. From and after the ratification of this section all laws and clauses of laws contained in any section of the General Statutes requiring the privy or private examination of a married woman are hereby repealed. (1945, c. 73, s. 21; 1951, c. 893, s. 1.)

Editor's Note. — Prior to the 1951 amendment this section appeared as § 47-116.

section, which formerly appeared as § 47-116, does not repeal § 52-12. Honeycutt v. Citizens Nat. Bank, 242 N. C. 734, 89 S. E. (2d) 598 (1955).

Section Does Not Repeal § 52-12.—This

ARTICLE 2.

Registration.

§ 47-17. Probate and registration sufficient without livery of seizin, etc.

Enforcing Defectively Framed Conditional Contract.—Called upon to choose between enforcing a defectively framed yet recognizable conditional contract, or treating it as a nullity for security purposes, the former is the choice indicated, there being

no specific statutory requirement to use a precise formula of words. Mickel-Hopkins, Inc. v. Frassinetti, 278 F. (2d) 301 (1960).

Applied in Clark v. Butts, 240 N. C. 709, 83 S. E. (2d) 885 (1954).

§ 47-17.1. Documents accepted for probate or recordation in certain counties to designate draftsman; exceptions.—The clerks of the superior courts of the counties named below shall not accept for probate or recordation any papers or documents, with the exception of holographic wills, executed after July 1, 1953, unless there shall appear on the cover page of said papers or documents following the words "drawn by" the signature of the person who drafted said papers or documents, or unless in some other manner the cover page shall clearly designate the draftsman of such document: Provided that papers or documents prepared in other counties of North Carolina or in other states or countries for probate or recordation in any of said counties, or papers or documents pre-

pared by any party to such papers or documents may be accepted for probate or recordation without such designation on the cover page of such papers or documents. This section shall apply to the following counties only: Alamance, Alexander, Buncombe, Catawba, Chatham, Cherokee, Cumberland, Davidson, Duplin, Durham, Gaston, Gates, Graham, Johnston, Lincoln, Madison, McDowell, Mecklenburg, Montgomery, New Hanover, Orange, Perquimans, Randolph, Rowan, Surry, Swain, Transylvania, Union, Wake, Watauga and Wilkes. (1953, c. 1160; 1955, cc. 54, 59, 87, 88, 264, 280, 410, 628, 655; 1957, cc. 431, 469, 932, 982, 1119, 1290; 1959, cc. 266, 312, 548, 589; 1961, cc. 789, 1167; 1965, cc. 160, 597, 830.)

Local Modification.—Alamance: 1957, c. 1290; Onslow: 1959, c. 783.

Editor's Note.—Session Laws 1955, cc. 54, 59, 87, 264, 280, 410, 628 and 655 made this section applicable to Wilkes, Gaston, Durham, Graham, Johnston, Cumberland, Watauga and Cherokee counties, respectively, and chapter 88 removed the county of Lenoir from its applicable provisions. Prior to the 1955 amendments the statute affected fewer than ten counties and therefore was not codified.

Session Laws 1957, c. 431, made this section applicable to Randolph and Transylvania counties, and chapter 982 made it applicable to Davidson and Forsyth counties. Chapters 469, 932, 1119 and 1290 made the section applicable to Madison, Lincoln, Surry and Alamance counties,

respectively.

The 1959 amendments made this section applicable to Duplin, Orange, New Hanover and McDowell counties, respectively.

The first 1961 amendment, effective July 1, 1961, inserted Alexander in the list of counties in this section. The second 1961 amendment deleted Forsyth from the list.

The first 1965 amendment, effective July 1, 1965, made this section applicable to Chatham County, the second 1965 amendment to Swain County, and the third 1965 amendment to Montgomery and Union counties.

For similar act applicable to Caldwell, Camden, Chowan, Currituck, Pasquotank, Rutherford and Vance counties, see Session Laws 1955, c. 273, amended by c. 575.

§ 47-18. Conveyances, contracts to convey and leases of land.—
(a) No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the donor, bargainor or lessor but from the time of registration thereof in the county where the land lies, or if the land is located in more than one county, then in each county where any portion of the land lies to be effective as to the land in that county.

(b) This section shall not apply to contracts, leases or deeds executed prior to March 1, 1885, until January 1, 1886; and no purchase from any such donor, bargainor or lessor shall avail or pass title as against any unregistered deed executed prior to December 1, 1885, when the person holding or claiming under such unregistered deed shall be in actual possession and enjoyment of such land, either in person or by his tenant, at the time of the execution of such second deed, or when the person claiming under or taking such second deed had at the time of taking or purchasing under such deed actual or constructive notice of such unregistered deed, or the claim of the person holding or claiming thereunder. (Code, s. 1245; 1885, c. 147, s. 1; Rev., s. 980; C. S., s. 3309; 1959, c. 90.)

I. IN GENERAL.

Editor's Note.—

The 1959 amendment changed this section so as to make it correspond with G. S. 47-20 and 47-20.1 with regard to lien creditors and place of registration.

For note on rights of lessees under oral leases, see 31 N. C. Law Rev. 498.

The object of registration, etc.—

In accord with original. See Clark v. Butts, 240 N. C. 709, 83 S. E. (2d) 885 (1954).

Purpose Is to Enable a Safe Reliance, etc.—

The purpose of this section is to point out to prospective purchasers the one place where they must go to find the condition of land titles—the public registry. Hayes v. Ricard, 245 N. C. 687, 97 S. E. (2d) 105 (1957).

Section Supplements § 22-2.—See note to § 22-2.

The recording of a deed is essential to its validity only as against creditors and

purchasers for a valuable consideration. Ballard v. Ballard, 230 N. C. 629, 55 S. E. (2d) 316 (1949); Dulin v. Williams, 239 N. C. 33, 79 S. E. (2d) 213 (1953).

The registration of a deed conveying an interest in land is essential to its validity as against a purchaser for a valuable consideration from the grantor. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Date of Registration Controls Title.—

In accord with original. See Clark v. Butts, 240 N. C. 709, 83 S. E. (2d) 885 (1954); Hayes v. Ricard, 245 N. C. 687, 97 S. E. (2d) 105 (1957).

First Registration Prevails.—

In accord with original. See Dulin v. Williams, 239 N. C. 33, 79 S. E. (2d) 213 (1953); Clark v. Butts, 240 N. C. 709, 83 S. E. (2d) 885 (1954); Hayes v. Ricard, 245 N. C. 687, 97 S. E. (2d) 105 (1957).

As between two purchasers for value of the same interest in land, the one whose deed is first registered acquires title. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Effect of Reference to Unregistered Encumbrance. — A reference to an unregistered encumbrance, if made with sufficient certainty, creates a trust or agreement that the property is held subject thereto. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Principles applicable to sufficiency of references necessary to impart vitality to a prior unregistered encumbrance may be stated as follows: (1) The creditor holding the prior unregistered encumbrance must be named and identified with certainty; (2) the property must be conveyed "subject to" or in subordination to such prior encumbrance; (3) the amount of such prior encumbrance must be definitely stated; and (4) the reference to the prior unregistered encumbrance must amount to a ratification and adoption thereof. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965), holding reference to a lease in a deed not sufficient to make the registered deed subordinate to the unregistered lease.

Quitclaim Deed. — A subsequently dated but prior recorded deed, including a quitclaim deed supported by consideration, takes precedence over a prior dated but subsequently recorded fee simple deed. Hayes v. Ricard, 245 N. C. 687, 97 S. E. (2d) 105 (1957).

Necessity for Recording Condemnation Judgment in Favor of United States. — A careful consideration of the Conformity Act, § 1-237, in relation to docketing judgments of federal courts and of the Regis-

tration Statute of North Carolina, § 47-18, does not sustain the position that a condemnation judgment in favor of the United States must be recorded in the county where the land lies, and cross indexed in order to protect its ownership in land that it has acquired. The government stands in a position quite different from an individual, and if the statute normally applies to an individual, it may not be applicable against the United States. United States v. Norman Lumber Co., 127 F. Supp. 518 (1955).

Applied in McCollum v. Smith, 233 N. C. 10, 62 S. E. (2d) 483 (1950).

Cited in Pearce v. Hewitt, 261 N.C. 408, 134 S.E.2d 662 (1964).

III. WHAT INSTRUMENTS AFFECTED.

A contract to convey standing timber, etc.—

In accord with original. See Dulin v. Williams, 239 N. C. 33, 79 S. E. (2d) 213 (1953).

Lease in Writing.—

A lease for more than three years must, to be enforceable, be in writing, and to protect it against creditors or subsequent purchasers for value, the lease must be recorded. Bourne v. Lay & Co., 264 N.C. 33, 140 S.E.2d 769 (1965).

Effect of Exemption of Short-Term Parol Leases. — The fact that parol leases for not more than three years are excepted from the operation of this section is not to be interpreted as meaning that a lessee under such lease is protected at all hazards or that his rights are superior to those of a bona fide purchaser for value from the lessor. These short-term parol tenancies are merely exempted from the operation of the section. This being so, one must look for guidance to the law as it stood prior to the passage of this section and as it now stands where the section has no application. Perkins v. Langdon, 237 N. C. 159, 74 S. E. (2d) 634 (1953).

Assignment of Lease for More than Three Years. — Though not mentioned in either § 22-2 or this section, an assignment of a lease for more than three years must, to be enforceable, be in writing and to protect against creditors or subsequent purchasers, must be recorded. Herring v. Volume Merchandise, Inc., 249 N. C. 221, 106 S. E. (2d) 197 (1958).

IV. RIGHTS OF PERSONS PROTECTED.

Possessor under Unregistered Contract to Convey—Rights to Improvements.—

In accord with 1st sentence in original.
See *Haas v. Smith*, 235 N. C. 341, 69 S. E. (2d) 714 (1952).

V. NOTICE.

No Notice Will Supply Want of Registration.—

In accord with 1st paragraph in original.
See *Dulin v. Williams*, 239 N. C. 33, 79 S. E. (2d) 213 (1953); *Dula v. Parsons*, 243 N. C. 32, 89 S. E. (2d) 797 (1955); *Hayes*

v. *Ricard*, 245 N. C. 687, 97 S. E. (2d) 105 (1957); *New Home Bldg. Supply Co., Inc. v. Nations*, 259 N. C. 681, 131 S. E. (2d) 425 (1963).

Actual knowledge, however full and formal, of a grantee in a registered deed of a prior unregistered deed or lease will not defeat his title as a purchaser for value in the absence of fraud or matters creating estoppel. *Bourne v. Lay & Co.*, 264 N.C. 33, 140 S.E.2d 769 (1965).

§ 47-19. Unregistered deeds prior to January, 1920, registered on affidavit.—Any person holding any unregistered deed or claiming title thereunder, executed prior to the first day of January, one thousand nine hundred and twenty, may have the same registered without proof of the execution thereof by making an affidavit, before the officer having jurisdiction to take probate of such deed, that the grantor, bargainor or maker of such deed, and the witnesses thereto, are dead or cannot be found, that he cannot make proof of their handwriting, and that affiant believes such deed to be a bona fide deed and executed by the grantor therein named. Said affidavit shall be written upon or attached to such deed, and the same, together with such deed, shall be entitled to registration in the same manner and with the same effect as if proved in the manner prescribed by law for other deeds. (1885, c. 147, s. 2; 1905, c. 277; Rev., s. 981; 1913, c. 116; 1915, cc. 13, 90; C. S., s. 3310; Ex. Sess. 1924, c. 56; 1951, c. 771.)

Editor's Note.—The 1951 amendment changed the year in the first sentence from "1890" to "1920".

§ 47-20. Deeds of trust, mortgages and conditional sales contracts; effect of registration.—No deed of trust or mortgage of real or personal property, or of a leasehold interest or other chattel real, or conditional sales contract of personal property in which the title is retained by the vendor, shall be valid to pass any property as against lien creditors or purchasers for a valuable consideration from the grantor, mortgagor or conditional sales vendee, but from the time of registration thereof as provided in this article, unless subject to the filing requirements of article 9 of the Uniform Commercial Code (chapter 25 of the General Statutes) and duly filed pursuant thereto. (1829, c. 20; R. C., c. 37, s. 22; Code, s. 1254; Rev., s. 982; 1909, c. 874, s. 1; C. S., s. 3311; 1953, c. 1190, s. 1; 1959, c. 1026, s. 2; 1965, c. 700, s. 8.)

Cross References.

As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

I. IN GENERAL.

Editor's Note.—

The 1953 amendment, effective January 1, 1954, rewrote this section and made it applicable to conditional sales contracts. The amendatory act also added §§ 47-20.1 to 47-20.3, repealed former § 47-23 and amended § 59-2. Section 5 of the amendatory act provides that it shall not be applicable to mortgages, deeds of trust or conditional sales registered prior to such effective date.

The 1959 amendment inserted, in line two, the words "or of a leasehold interest or other chattel real."

The 1965 amendment, effective at midnight June 30, 1967, added at the end of the section the language following "this article."

For comment on the 1953 amendatory act, see 31 N. C. Law Rev. 429.

For comment on persons protected by this section, see 28 N. C. Law Rev. 305.

For article on bankruptcy and the automobile dealer, involving the effect of this section, see 34 N. C. Law Rev. 312.

This section regulates priorities as between written instruments affecting the title to property and other legal claims. *M. & J. Finance Corp. v. Hodges*, 230 N. C. 580, 55 S. E. (2d) 201 (1949).

The courts of this State have adopted a strict policy, etc.—

In its interpretation of the North Carolina recording statutes, the Supreme Court

of that State has insisted on strict compliance. *McKnight v. M. & J. Finance Corp.*, 247 F. (2d) 112 (1957).

Execution Lien Superior to Unrecorded Mortgage.—Where the assignee of a note and mortgage securing the purchase price of an automobile failed to record the mortgage before an execution was issued in order to satisfy a judgment secured by a creditor, the lien of execution is superior to the assignee's chattel mortgage. *M. & J. Finance Corp. v. Hodges*, 230 N. C. 580, 55 S. E. (2d) 201 (1949).

Mortgagees in unregistered mortgage have no priority as against assets of corporate mortgagor in receivership. This is so for the reason that by adjudication of insolvency and the appointment of the receiver, the creditors at large of the corporation, represented by the receiver, became in legal contemplation creditors for a valuable consideration within the meaning of this section and, therefore, the deed of trust as to the receiver is void. *Eno Inv. Co. v. Protective Chemicals Laboratory*, 233 N. C. 294, 63 S. E. (2d) 637 (1951).

Applied in *King v. Premo & King, Inc.*, 258 N. C. 701, 129 S. E. (2d) 493 (1963).

Quoted in *Franklin Nat. Bank v. Ramsey*, 252 N. C. 339, 113 S. E. (2d) 723 (1960).

Cited in *Home Finance Co. v. O'Daniel*, 237 N. C. 286, 74 S. E. (2d) 717 (1953); *Handley Motor Co. v. Wood*, 237 N. C. 318, 75 S. E. (2d) 312 (1953); *In re Steele*, 122 F. Supp. 948 (1954); *Haworth v. General Motors Accept. Corp.*, 238 F. (2d) 203 (1956).

II. REGISTRATION AS BETWEEN PARTIES.

Valid without Registration.—

An unregistered instrument is valid as between the parties. *Coastal Sales Co. v. Weston*, 245 N. C. 621, 97 S. E. (2d) 267 (1957).

In case of a mortgage of personal property, the right of property is conveyed to the mortgagee by a perfect title, which title is liable to be defeated by the payment of the mortgage debt, and if the mortgagee takes possession of the property, he takes it as his own, and not as the mortgagor's. Such a lien is good between the parties, without a change of possession, even though void as against subsequent purchasers in good faith without notice, and creditors levying executions or attachments; and if followed by a delivery of possession, before the rights of third persons have intervened, it is good absolutely. *McCreary Tire & Rubber Co. v. Crawford*, 253 N. C. 100, 116 S. E. (2d) 491 (1960).

Personal Representative Occupies Intestate's Position.—

The personal representative takes only that title which the deceased had in the property at the time of his death, and an unrecorded mortgage lien has the same status as against the personal representative that it had against the deceased, regardless of whether the estate is solvent or insolvent. *Coastal Sales Co. v. Weston*, 245 N. C. 621, 97 S. E. (2d) 267 (1957).

III. INSTRUMENTS AFFECTED.

Instrument Sufficient to Put Interested Person on Notice of Conditional Sales Contract.—An instrument which was recorded and indexed as a chattel mortgage or conditional sales contract, and which in its concluding sentence characterized itself as "this conditional contract," was sufficient to put an interested person on notice of the conditional sales contract intended by the parties, and would be given effect as such a contract against the buyer's trustee in bankruptcy, notwithstanding the fact that when the instrument was prepared by piecing together portions of several printed contract forms to make one document, lines expressly providing for retention of title in the seller had been inadvertently covered over. *Mickel-Hopkins, Inc. v. Frassinetti*, 278 F. (2d) 301 (1960), reversing 177 F. Supp. 277 (1959).

Where a Transaction Is in Effect a Pledge of Security for Borrowed Money, etc.—

The citation to the paragraph under this catchline in the original should read: *Bundy v. Commercial Credit Co.*, 202 N. C. 604, 163 S. E. 676 (1931).

An equitable assignment of accounts receivable is not within the protective provisions of this section. *Presley E. Brown Lumber Co. v. Textile Banking Co.*, 248 N. C. 308, 103 S. E. (2d) 334 (1958).

Section 20-57 does not supplant registration statute.—*Southern Auto Finance Co. v. Pittman*, 253 N. C. 550, 117 S. E. (2d) 423 (1960), decided under former § 47-23. But see present §§ 20-58 to 20-58.10 as to security interests in motor vehicles.

IV. RIGHTS OF PERSONS PROTECTED.

The word "creditors" as used in this section means those who have acquired a lien by judicial process or other means. *Community Credit Co. of Lenoir, Inc. v. Norwood*, 257 N. C. 87, 125 S. E. (2d) 369 (1962).

The word creditor, as used in this section, does not mean a general creditor; it

means a lien creditor—one who has a recorded mortgage, or has possession of the chattel for the purpose of securing mortgagor's debt. *Wachovia Bank & Trust Co. v. Wayne Fin. Co.*, 262 N.C. 711, 138 S.E.2d 481 (1964).

This section does not protect every creditor against unrecorded mortgages. It protects only (1) purchasers for a valuable consideration from the mortgagor, and (2) creditors who have first fastened a lien upon the property in some manner sanctioned by law. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E. (2d) 267 (1957).

Creditor and Purchaser for Value.—

This section is designed to protect creditors and purchasers for value against any adverse claim founded on an unrecorded lien. *M. & J. Finance Corp. v. Hodges*, 230 N.C. 580, 55 S.E. (2d) 201 (1949).

Unregistered mortgages are of no validity whatsoever as against creditors and purchasers for value. And they take effect as against such interested third parties from and after registration just as if they had been executed then and there. *M. & J. Finance Corp. v. Hodges*, 230 N.C. 580, 55 S.E. (2d) 201 (1949).

Trustee under Deed of Assignment for Benefit of Creditors.—Our decisions are to the effect that the trustee under a deed of assignment for the benefit of creditors is a purchaser for a valuable consideration within the meaning of this section, and that, upon adjudication of insolvency and the appointment of a receiver, the unsecured creditors, then represented by the receiver, are deemed to have fastened a lien on the insolvent's property. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E. (2d) 267 (1957), citing *Finance Corp. v. Hodges*, 230 N.C. 580, 55 S.E. (2d) 201 (1949), and *Eno Investment Co. v. Protective Chemicals Laboratory*, 233 N.C. 294, 63 S.E. (2d) 637 (1951).

Death of Mortgagor.—The rights of secured and unsecured creditors alike are fixed at the instant of the debtor's death, and the circumstance of death cannot have the effect of fastening a lien upon property of the estate in favor of unsecured creditors. Thus, the mortgagee under an unrecorded chattel mortgage on after-acquired property has a lien on the property as against the administratrix of the mortgagor's estate superior to the claim of general creditors of the estate who had not fastened a lien upon the property at the time of intestate's death. *Coastal Sales Co. v. Weston*, 245 N.C. 621, 97 S.E. (2d) 267 (1957).

Pre-existing Debt a Valuable Consideration.—As to liens coming within the purview of this section, a pre-existing debt is a valuable consideration and is sufficient to support the claim of a creditor who has fastened his lien upon the property of his debtor. *M. & J. Finance Corp. v. Hodges*, 230 N.C. 580, 55 S.E. (2d) 201 (1949).

Rights of Chattel Mortgagee.—When a creditor takes a chattel mortgage from his debtor as security for the payment of his debt and causes the mortgage to be registered in the county where the debtor resides or in the county where the personal property is situated in case the debtor resides out of the State, he acquires property rights in the personal property covered by his mortgage. These rights entitle the creditor to sell the mortgaged property for the satisfaction of his debt, and are tantamount to a specific lien on specific property within the purview of the decisions interpreting 31 U.S.C.A. § 191 relating to priority of debts due the United States from an insolvent. *National Surety Corp. v. Sharpe*, 236 N.C. 35, 72 S.E. (2d) 109 (1952).

An unrecorded chattel mortgage is given no effect against lien creditors under North Carolina law. *McKnight v. M. & J. Finance Corp.*, 247 F. (2d) 112 (1957).

Where a mortgagor is permitted to retain possession of chattels, the mortgagee acquires no lien as against purchasers or creditors, but from the registration of the instrument. *Wachovia Bank & Trust Co. v. Wayne Fin. Co.*, 262 N.C. 711, 138 S.E.2d 481 (1964).

The common-law rule that the title of the mortgagee is good as against any person in possession has been altered by this section only to the extent of protecting against an unregistered lien creditors and those purchasers who deraign title from the mortgagor. *Friendly Finance Corp. v. Quinn*, 232 N.C. 407, 61 S.E. (2d) 192 (1950).

Also Rule as to Title of Conditional Vendor.—The common-law rule that title of conditional vendor is good as against any person in possession has been altered by this section only to the extent of protecting against unregistered lien creditors and those purchasers who deraign title from the conditional vendee, and this section does not extend protection to purchasers who are strangers to the vendor's title. *Friendly Finance Corp. v. Quinn*, 232 N.C. 407, 61 S.E. (2d) 192 (1950), decided under former § 47-23.

Purchasers Not Entitled to Protection

of Statutes. — Where the resident purchaser of an automobile, which was subject to a conditional sale contract executed in another state, failed to show that his title was acquired directly or by mesne conveyances from the conditional vendee, he was not entitled to the protection of this section and former § 47-23 since he had the burden of showing that he was a purchaser within the protection of the statutes, and mere possession alone was insufficient for that purpose. *Friendly Finance Corp. v. Quinn*, 232 N. C. 407, 61 S. E. (2d) 192 (1950). See §§ 20-58 to 20-58.10 as to security interests in automobiles.—Ed. Note.

V. NOTICE.

This section is designed to give notice of chattel mortgages to third persons. *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. (2d) 356 (1950).

And former § 47-23 was designed to give notice of conditional sales to third persons. *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. (2d) 356 (1950).

This section and former § 47-23 were designed to give notice to persons of the classes mentioned therein, and to prevent fraud and deception by protecting them from the effects of secret liens and from losses which they might otherwise sustain by relying upon the possession and apparent ownership of the chattels in the vendee. *Montague Bros. v. Shepherd Co.*, 231 N. C. 551, 58 S. E. (2d) 118 (1950).

No Notice, etc.—

In accord with original. See *New Home Bldg. Supply Co., Inc. v. Nations*, 259 N. C. 681, 131 S. E. (2d) 425 (1963).

Recording and indexing a mortgage executed by one not the owner of the property mentioned therein will not give constructive notice binding upon third parties dealing with the true owner. It is, at least as to third parties, as though no mortgage had been made. *McKnight v. M. & J. Finance Corp.*, 247 F. (2d) 112 (1957).

VI. PLACE OF REGISTRATION.

Editor's Note.—The cases cited below were decided under this section as it formerly read and under former § 47-23.

County of Actual Personal Residence.—

The provisions of this section and former § 47-23 that a conditional sales contract or chattel mortgage be registered in the county of the residence of the vendee or mortgagor require registration in the county of his residence as distinguished from domicile to effectuate the

purpose of the statutes to give notice to interested parties. *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. (2d) 356 (1950).

The requirement that a conditional sales contract or chattel mortgage is to be recorded in the county where its maker has his actual personal residence is based on the legislative realization that persons "interested to have knowledge in such respect would go to the county where a person resides to see what disposition he had made of his personal property by deeds and other instruments required to be registered." *Montague Bros. v. Shepherd Co.*, 231 N. C. 551, 58 S. E. (2d) 118 (1950); *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. (2d) 356 (1950).

Meaning of "Residence". — The word "residence" as formerly used in this section and in former § 47-23 imparts less than domicile and more than physical presence in the character of a mere transient, and means a fixed abode for the time being, or actual personal residence. *Sheffield v. Walker*, 231 N. C. 556, 58 S. E. (2d) 356 (1950).

Subsequent Change of Residence or Removal of Property.—Where a chattel mortgage or conditional sales contract is registered in the proper county, subsequent change of residence of the mortgagor or vendee, or subsequent removal of the property to another county of the State, does not affect the lien, there being no requirement of a second registration in this State in either of these events. *Montague Bros. v. Shepherd Co.*, 231 N. C. 551, 58 S. E. (2d) 118 (1950).

Registration in Another County of No Effect. — A chattel mortgage or conditional sales contract is valid as against creditors or purchasers for value as of the time of registration in the proper county, and registration in any county other than that specified by law is of no effect. *Montague Bros. v. Shepherd Co.*, 231 N. C. 551, 58 S. E. (2d) 118 (1950).

Chattel Situated Where Regularly Used. — A chattel is situated within the meaning of the registration statutes where it is regularly used day by day, or where it is regularly kept when not in actual use. *Montague Bros. v. Shepherd Co.*, 231 N. C. 551, 58 S. E. (2d) 118 (1950).

Situs Required before or after Foreign Registry.—Section 47-20 lends itself to the interpretation that where chattel mortgages are made by nonresidents it intends to leave within its protection only those mortgages on personal property and similar lien contracts, including conditional sales under former § 47-23, which are

registered in the county of the situs in this State, whether that situs be acquired before or after foreign registry. Associates Discount Corp. v. McKinney, 230 N. C. 727, 55 S. E. (2d) 513 (1949).

§ 47-20.1. Place of registration; real property. — To be validly registered pursuant to G. S. 47-20, a deed of trust or mortgage of real property must be registered in the county where the land lies, or if the land is located in more than one county, then the deed of trust or mortgage must be registered in each county where any portion of the land lies in order to be effective as to the land in that county. (1953, c. 1190, s. 2.)

Editor's Note.—The act inserting this section is effective as of January 1, 1954. See note to § 47-20.

§ 47-20.2. Place of registration; personal property.—(a) As used in this section:

- (1) "Mortgage" includes a deed of trust and a conditional sales contract; unless subject to the filing requirements of article 9 of the Uniform Commercial Code (chapter 25) and duly filed pursuant thereto;
- (2) "Mortgagor" includes a grantor in a deed of trust and a conditional sales vendee.

(b) To be validly registered pursuant to G. S. 47-20, a mortgage of personal property must be registered as follows:

- (1) If the mortgagor is an individual:
 - a. Who resides in this State, the mortgage must be registered in the county where the mortgagor resides when the mortgage is executed.
 - b. Who resides outside this State, the mortgage must be registered in each county in this State where any of the tangible mortgaged property is located at the time the mortgage is executed, in order to be effective as to such property; and if any of the mortgaged property consists of a chose in action which arises out of the business transacted at a place of business operated by the mortgagor in this State, then the mortgage must be registered in the county where such place of business is located.
- (2) If the mortgagor is a partnership, either limited or unlimited:
 - a. Which has a principal place of business in this State, the mortgage must be registered in the county where such place of business is located at the time the mortgage is executed.
 - b. Which does not have a principal place of business in this State but has any place of business in this State, the mortgage must be registered in every county in this State where any such place of business is located at the time the mortgage is executed. Where such mortgage is registered in one or more of such counties but is not registered in every county required under this subsection, it shall, nevertheless, be effective as to the property in every county in which it is registered.
 - c. Which has no place of business in the State, the mortgage must be registered in every county in this State where a partner resides at the time the mortgage is executed. Where such mortgage is registered in one or more of such counties but is not registered in every county required under this subsection, it shall, nevertheless, be effective as to the property in every county in which it is registered.
 - d. Which has no place of business in this State, and no partner residing in this State, the mortgage must be registered in each county in this State where any of the mortgaged property is

located when the mortgage is executed, in order to be effective as to the property in such county.

(3) If the mortgagor is a domestic corporation:

- a. Which has a registered office in this State, the mortgage must be registered in the county where such registered office is located when the mortgage is executed.
- b. Which having been formed prior to July 1, 1957, has no such registered office but does have a principal office in this State as shown by its certificate of incorporation, or amendment thereto, or legislative charter, the mortgage must be registered in the county where the principal office is said to be located by such certificate of incorporation, or amendment thereto, or legislative charter when the mortgage is executed.

(4) If the mortgagor is a foreign corporation:

- a. Which has a registered office in this State, the mortgage must be registered in the county where such registered office is located when the mortgage is executed.
- b. Which, having been domesticated prior to July 1, 1957, has no such registered office in this State, but does have a principal office in this State, the mortgage must be registered in the county where the principal office is said to be located by the statement filed with the Secretary of State in its application for permission to do business in this State or other document filed with the Secretary of State showing the location of such principal office in this State when the mortgage is executed.
- c. Which has not been domesticated in this State, the mortgage must be registered in the same county or counties as a mortgage executed by a nonresident individual.

(5) If the personal property concerned is a vehicle required to be registered under the motor vehicle laws of the State of North Carolina, then the provisions of this section shall not apply but the security interest arising from the deed of trust, mortgage, conditional sales contract, or lease intended as security of such vehicle may be perfected by recordation in accordance with the provisions of G. S. 20-58 through 20-58.10. (1953, c. 1190, s. 2; 1957, c. 979, ss. 1, 2; 1961, c. 835, s. 12; 1965, c. 700, s. 8.)

Cross Reference.—As to perfection of security interests in vehicles requiring certificates of title, see §§ 20-58 to 20-58.10.

Editor's Note.—The act inserting this section is effective as of January 1, 1954, and by section 5 it is provided that the act "shall not be applicable to mortgages, deeds of trust or conditional sales contracts registered prior to the effective date."

The 1957 amendment rewrote (3) and (4) of subsection (b). Section 3 of the amendatory act provides that any mortgage registered before July 1, 1957 shall not be affected by the amendment.

The 1961 amendment, effective July 1, 1961, added subdivision (5) to subsection (b).

The 1965 amendment, effective at midnight June 30, 1967, added the language following the first semicolon in subdivision (1) of subsection (a).

For comment on this section, see 31 N.C. Law Rev. 429.

Place of Registration.—For decisions relating to place of registration, see note to § 47-20.

Prior to the 1957 amendment, the actual location of the principal office of a corporation rather than the location set out in the certificate of incorporation was held to govern the place of registration. Haworth v. General Motors Accept. Corp., 238 F. (2d) 203 (1956).

Applied in National Bank of Sanford v. Greensboro Motor Co., 284 N.C. 568, 142 S.E.2d 166 (1965).

§ 47-20.3. Place of registration; instruments covering both personal property and real property. To be validly registered pursuant to G.

S. 47-20, a mortgage, deed of trust or conditional sales contract, or any combination of these, of both personal property and real property must be registered pursuant to the provisions of G. S. 47-20.1 for the real property covered by the instrument and pursuant to the provisions of G. S. 47-20.2 for the personal property covered by the instrument, and in each case the registration must be indexed in the records designated for the particular type of property involved. (1953, c. 1190, s. 2.)

Editor's Note.—The act inserting this section is effective as of January 1, 1954. See note to § 47-20.

§ 47-20.4. Place of registration; chattel real.—To be validly registered pursuant to G. S. 47-20, a deed of trust or mortgage of a leasehold interest or other chattel real must be registered in the county where the land involved lies, or if the land involved is located in more than one county, then the deed of trust or mortgage must be registered in each county where any portion of the land involved lies in order to be effective as to the land in that county. (1959, c. 1026, s. 1.)

§ 47-23: Repealed by Session Laws 1953, c. 1190, s. 3.

Editor's Note.—The act repealing this section is effective as of January 1, 1954. See note to § 47-20.

§ 47-26. Deeds of gift.

Title Vests in Grantor.—

In accord with original. See Kirkpatrick v. Sanders, 261 F. (2d) 480 (1958).

"Making" as Used in This Section, etc.—

In accord with original. See Muse v. Muse, 236 N. C. 182, 72 S. E. (2d) 431 (1952).

Consideration Not Sufficient to Remove Deed from Operation of Section. — The agreement by a wife to perform ordinary marital duties is not sufficient consideration to remove a deed made to her from the operation of this section. Sprinkle v. Ponder, 233 N. C. 312, 64 S. E. (2d) 171 (1951).

§ 47-27. Deeds of easements.

From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959, in the same manner and to the same extent that individuals, firms or corporations are required to record such easements. (1917, c. 148; 1919, c. 107; C. S., s. 3316; 1943, c. 750; 1959, c. 1244.)

Editor's Note.—

The 1959 amendment added the last paragraph. As only this paragraph is new the rest of the section is not set out.

Priority of Duly Recorded Easement.—Where the owner of land conveys a portion thereof together with an easement over his remaining lands by deed duly recorded, grantees of the servient tenement, directly or by mesne conveyances, take title subject to the duly recorded easement, notwithstanding that no deed in their chain of title refers to such easement. Waldrop v. Brevard, 233 N. C. 26, 62 S. E. (2d) 512 (1950).

Recorded Deed of Gift Is Valid without Consideration.—A deed of gift, duly signed and delivered, is an executed contract. If recorded within the time prescribed by this section it is valid, as between the parties and their heirs, without consideration, good or valuable. Edwards v. Batts, 245 N. C. 693, 97 S. E. (2d) 101 (1957).

A deed deposited in escrow with third party to be recorded after death of grantors and which was not recorded until over two years after its execution was void. Harris v. Briley, 244 N. C. 526, 94 S. E. (2d) 476 (1956).

Applied in Batchelor v. Mitchell, 238 N. C. 351, 78 S. E. (2d) 240 (1953).

withstanding that no deed in their chain of title refers to such easement. Waldrop v. Brevard, 233 N. C. 26, 62 S. E. (2d) 512 (1950).

Easement obtained by Highway Commission prior to June 1, 1959, need not be recorded. Kaperonis v. North Carolina State Highway Comm'n, 260 N.C. 587, 133 S.E.2d 164 (1963).

Quoted in Borders v. Yarbrough, 237 N. C. 540, 75 S. E. (2d) 541 (1953).

§ 47-30. Plats and subdivisions; mapping requirements. — (a) Size Requirements.—All land maps presented to the register of deeds for recording in the registry of a county in North Carolina after January 1, 1960, shall have an outside marginal size of not more than twenty-one inches by thirty inches nor less than eight and one-half inches by eleven inches, including one and one-half inches for binding on the left margin and one-half inch border on each of the other sides. Where size of land areas, or suitable scale to assure legibility require, maps may be placed on two or more sheets with appropriate match lines. All counties currently operating under statutes or other laws setting forth regulatory size will be allowed to continue to use such sizes as are currently in use until June 30, 1963, on or before which time they shall modify their size to conform to those shown above.

(b) Maps to Be Reproducible. — All maps presented for recording shall be a reproducible map in cloth, linen, film, or other permanent material and submitted in this form. Such recorded map shall be maintained in map files and a direct or photographic copy shall be placed in the map book maintained for that purpose and properly indexed for use.

(c) Information Contained in Title of Map.—The title of each map shall contain the following information: Property designation, name of owner, location to include township, county and State, the date or dates the survey was made; scale in feet per inch in words or figures and bar graph; name, address, registration number and seal of engineer or surveyor.

(d) Certificate; Form.—There shall appear on each map a certificate by the person making the survey, or on each map where no survey was made, or a certificate by the person under whose supervision such survey or such map was made, stating the origin of the information shown on the map, including deeds and any recorded data shown thereon. If a complete survey was made, the error of closure as calculated by latitudes and departures must be shown. Any lines on the map that were not actually surveyed must be clearly indicated and a statement included revealing the source of information. The execution of such certificate shall be acknowledged before any officer authorized to take acknowledgments by the person preparing the map. All maps to be recorded shall be probated as required by law for the registration of deeds.

The certificate required above shall include the source of information for the survey and data indicating the accuracy of closure of the map, and shall be in substantially the following form: "I , certify that this map was (drawn by me) (drawn under my supervision) from (an actual survey made by me) (an actual survey made under my supervision) (deed description recorded in Book , page , Book , page , etc.) (other); that the error of closure as calculated by latitudes and departures is 1: ; that the boundaries not surveyed are shown as broken lines plotted from information found in Book , page ; that this map was prepared in accordance with G. S. 47-30 as amended. Witness my hand and seal this day of , A. D. 19.....

.....
Surveyor or Engineer"

Failure of the surveyor to comply with the requirements of this section shall not preclude recordation provided that the officer accepting the map for recordation shall require the presence on the map of the surveyor's seal and the surveyor's certificate of acknowledgment.

(e) Showing Method of Computation.—If area of land parcels is shown, the method of computation used by the surveyor must be shown. Area "by estimation" is not acceptable, nor is the area copied from another source.

(f) Map to Contain Specific Information.—Every map shall contain the following specific information:

(1) An accurately positioned north arrow co-ordinated with any bearings

shown on the map. Indication shall be made as to whether the north index is true, magnetic or grid.

- (2) The azimuth or courses and distances as surveyed of every line shall be shown including offset lines where actually used in the field. Distances shall be in feet and decimals thereof; other units of measure may be placed in parentheses if desired.
- (3) All map lines shall be by horizontal (level) measurements. All information shown on the map shall be correctly plotted to the scale shown. Enlargement of portions of a map are acceptable in the interest of clarity, where shown as inserts on the same sheet.
- (4) Where a boundary is formed by a curved line, the following data must be given: actual survey data from the point of curvature of the curve to the point of tangent shall be shown as standard curve data, or as a traverse of chords around the curve.
- (5) Where a subdivision of land is set out on the map, all streets and lots shall be carefully plotted with dimension lines indicating widths and all other pertinent information necessary to re-establish in the field.
- (6) Where control corners have been established in compliance with G. S. 39-32.1, 2, 3, and 4, as amended, the location and pertinent information as required in the reference statute shall be plotted on the map. All other corners which are marked by monument or natural object shall be so identified on all maps, and all corners of adjacent owners in the boundary lines of the subject tract which are marked by monument or natural object must be shown with a distance from one or more of the subject tract's corners.
- (7) The names of adjacent landowners and lot block and subdivision designations shall be shown where they have been determined and verified by the surveyor.
- (8) All visible and apparent rights of way, watercourses, utilities, roadways, and other such improvements shall be accurately located where crossing or forming any boundary line of the property shown, and locating, offset or traverse lines shall be plotted in broken lines with azimuths or courses and distances shown on the map.
- (9) Where the map is the result of a survey, one or more corners shall, by a system of azimuths or courses and distances, be accurately tied to a monument of some United States or State Agency Survey System, such as the United States Coast and Geodetic Survey Systems, where such monument is within 2,000 feet of said corner. Where the North Carolina Grid System co-ordinates of said monument have been published by the North Carolina Department of Conservation and Development, the co-ordinates of the referenced corner shall be computed and shown in X and Y ordinates on the map. Where such a monument is not available, the tie shall be made to some pertinent and permanent recognizable landmark or identifiable point.

(g) Recording of Map.—A map, when proven and probated as provided herein as deeds and other conveyances, when presented for recording, shall be recorded in the Map Book and when so recorded shall be duly indexed. Reference in any instrument hereafter executed to the record of any map herein authorized shall have the same effect as if the description of the lands as indicated on the record of the map were set out in the instrument.

(h) Nothing in this section shall be deemed to prevent the recording of any map made prior to January 1, 1960.

(i) Nothing in this section shall be deemed to invalidate any instrument or the title thereby conveyed making reference to any recorded map.

(j) The provisions of this section shall not apply to boundary maps of areas annexed by municipalities nor to maps of municipal boundaries, whether or not required by law to be recorded.

(k) The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Anson, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Mitchell, Northampton, Pamlico, Pasquotank, Pender, Perquimans, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Union, Vance, Warren, Washington, Watauga and Yadkin. (1911, c. 55, s. 2; C. S., s. 3318; 1923, c. 105; 1935, c. 219; 1941, c. 249; 1953, c. 47, s. 1; 1959, c. 1235, ss. 1, 3A, 3.1; 1961, cc. 7, 111, 164, 199, 252, 660, 687, 932, 1122; 1963, c. 71, ss. 1, 2; cc. 180, 236; c. 361, s. 1; c. 403; 1965, c. 139, s. 1.)

Local Modification.—Davie, as to subsection (f) (3): 1961, c. 609; Wilson: 1957, c. 1137.

Editor's Note.—

The 1953 amendment inserted at two places in the first sentence the words "according to the best of his knowledge and belief." As to validation of registration of plats prior to the amendment, see § 47-108.10.

The 1959 amendment, effective Jan. 1, 1960, rewrote this section.

The first 1961 amendment inserted "Hertford" in the list of counties in subsection (k). The second 1961 amendment added Sampson, Warren and Yadkin to the list. The third 1961 amendment inserted "Brunswick" and "Richmond" in the list. The fourth 1961 amendment inserted "Anson", "Perquimans" and "Union" in the list. The fifth 1961 amendment added "Vance" to the list.

The sixth 1961 amendment rewrote part of the first sentence of subsection (d) and the first part of the form of the certificate contained therein. It also changed the first line of subsection (g) by substituting

"A" for "Such" and by deleting "prepared" formerly appearing before the word "proven".

The seventh 1961 amendment inserted "Granville" in the list of counties in subsection (k).

The eighth 1961 amendment inserted "Camden" in subsection (k).

The ninth 1961 amendment inserted "Lincoln" in subsection (k).

The first 1963 amendment inserted, near the beginning of the second paragraph of subsection (d), the words "include the source of information for the survey and data indicating the accuracy of closure of the map, and shall." It also added the third paragraph of subsection (d).

The second 1963 amendment inserted "Mitchell" in subsection (k).

The third 1963 amendment deleted "Bladen" from subsection (k).

The fourth 1963 amendment inserted "Rockingham" in subsection (k).

The fifth 1963 amendment inserted subsection (j).

The 1965 amendment inserted "Clay" in the list of counties in subsection (k).

§ 47-30.1. Plats and subdivisions; alternative requirements.—In a county to which the provisions of G. S. 47-30 do not apply, any person, firm or corporation owning land may have a plat thereof recorded in the office of the register of deeds if such land or any part thereof is situated in the county, upon proof upon oath by the surveyor making such plat or under whose supervision such plat was made that the same is in all respects correct according to the best of his knowledge and belief and was prepared from an actual survey by him made, or made under his supervision, giving the date of such survey, or if the surveyor making such plat is dead, or where land has been sold and conveyed according to an unrecorded plat, upon the oath of a duly licensed surveyor that said map is in all respects correct according to the best of his knowledge and belief and that the same was actually and fully checked and verified by him, giving the date on which the same was verified and checked. (1961, c. 534, s. 1; c. 985.)

Editor's Note.—Session Laws 1961, c. 534, s. 2, provides that any plat recorded in accordance with the provisions of G. S. 47-30.1 in a county to which the provisions of G. S. 47-30 do not apply, between December 31, 1959, and May 30, 1961, is

hereby in all respects validated and confirmed.

Session Laws 1961, c. 985, extended the application of this section to plats or surveys made under the surveyor's supervision.

§ 47-32. Photographic copies of plats, etc.; fees of clerk. — After January 1, 1960, in all special proceedings in which a map shall be filed as a part of the papers, such map shall meet the specifications required for recording of maps in the office of the register of deeds, and the clerk of superior court may certify a copy thereof to the register of deeds of the county in which said lands lie for recording in the Map Book provided for that purpose; and the clerk of superior court may have a photographic copy of said map made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, may place said photographic copy in said book at the end of the report of the commissioner or other document referring to said map. The clerk of superior court shall be allowed a fee to be fixed by the county commissioners, to be taxed in the bill of costs, which fee shall cover the cost of making said photographic copy and all services of the clerk in connection therewith.

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Vance, Warren, Washington, Watauga and Yadkin. (1931, c. 171; 1959, c. 1235, ss. 2, 3A, 3.1; 1961, cc. 7, 111, 164, 252, 697, 932, 1122; 1963, c. 71, s. 3; c. 236; c. 361, s. 2; 1965, c. 139, s. 2.)

Editor's Note.—The 1959 amendment, effective Jan. 1, 1960, rewrote this section.

The first 1961 amendment inserted "Hertford" in the list of counties in the last paragraph of this section. The second 1961 amendment added Sampson, Warren and Yadkin to the list. The third 1961 amendment inserted "Brunswick" and "Richmond" in the list. The fourth 1961 amendment added "Vance" to the list. The fifth 1961 amendment inserted "Granville" in the list. The sixth 1961 amendment inserted "Camden" in the list. And the

seventh 1961 amendment inserted "Lincoln" in the list.

The first 1963 amendment substituted "may" for "shall" in three places in the first sentence.

The second 1963 amendment deleted "Bladen" from the last paragraph.

The third 1963 amendment inserted "Rockingham" in the list of counties.

The 1965 amendment inserted "Clay" in the list of counties in the last paragraph of this section.

§ 47-32.1. Photostatic copies of plats, etc.; fees of clerk; alternative provisions.—In a county to which the provisions of G. S. 47-32 do not apply, the following alternative provisions shall govern photostatic copies of plats filed in special proceedings:

In all special proceedings in which a plat, map or blueprint shall be filed as a part of the papers, the clerk of the superior court may have a photostatic copy of said plat, map or blueprint made on a sheet of the same size as the leaves in the book in which the special proceeding is recorded, and when made, shall place said photostatic copy in said book at the end of the report of the commissioners or other document referring to said plat, map or blueprint. The clerk of the superior court shall be allowed a fee to be fixed by the county commissioners not exceeding the sum of five dollars (\$5.00) to be taxed in the bill of costs, which fee shall cover the cost of making said photostatic copy and all services of the clerk in connection therewith. (1961, c. 535, s. 1.)

Editor's Note.—The 1961 act inserting this section renumbered former § 47-32.1 to appear as § 47-32.2.

Session Laws 1961, c. 535, s. 2, provides that any plat filed as part of the papers in a special proceeding in accordance with

the provisions of G. S. 47-32.1, in a county to which the provisions of G. S. 47-32 do not apply, between December 31, 1959, and May 30, 1961, is hereby in all respects validated and confirmed.

§ 47-32.2. Violation of § 47-30 or § 47-32 a misdemeanor. — Any person, firm or corporation wilfully violating the provisions of § 47-30 or § 47-32 shall be guilty of a misdemeanor and upon conviction shall be subject to a fine

of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00).

The provisions of this section shall not apply to the following counties: Alexander, Alleghany, Ashe, Beaufort, Brunswick, Camden, Caswell, Cherokee, Clay, Franklin, Granville, Greene, Harnett, Hertford, Hoke, Hyde, Jackson, Jones, Lee, Lenoir, Lincoln, Madison, Martin, Northampton, Pamlico, Pasquotank, Pender, Person, Pitt, Richmond, Robeson, Rockingham, Sampson, Scotland, Surry, Swain, Tyrrell, Vance, Warren, Washington, Watauga and Yadkin. (1959, c. 1235, ss. 3, 3A, 3.1; 1961, cc. 7, 111, 164, 252; c. 535, s. 1; cc. 687, 932, 1122; 1963, c. 236; c. 361, s. 3; 1965, c. 139, s. 3.)

Editor's Note.—The 1959 act inserting this section is effective as of Jan. 1, 1960.

The first 1961 amendment inserted "Hertford" in the list of counties in the last paragraph of this section. The second 1961 amendment added Sampson, Warren and Yadkin to the list. The third 1961 amendment inserted "Brunswick" and "Richmond" in the list. The fourth 1961 amendment added "Vance" to the list. The fifth 1961 amendment renumbered this section which was formerly § 47-32.1. The

sixth 1961 amendment inserted "Granville" in the list of counties. The seventh 1961 amendment inserted "Camden" in the list. And the eighth 1961 amendment inserted "Lincoln" in the list.

The first 1963 amendment deleted "Bladen" from the last paragraph.

The second 1963 amendment inserted "Rockingham" in the list of counties.

The 1965 amendment added "Clay" in the list of counties in the last paragraph of this section.

ARTICLE 3.

Forms of Acknowledgment, Probate and Order of Registration.

§ 47-37. Adjudication and order of registration.

Applied in *Clark v. Butts*, 240 N. C. 709, 83 S. E. (2d) 885 (1954).

§ 47-39. Form of acknowledgment of conveyances and contracts between husband and wife.—When an instrument or contract purports to be signed by a married woman and such instrument or contract comes within the provisions of § 52-12 of the General Statutes, the form of certificate of her acknowledgment before any officer authorized to take the same shall be in substance as follows:

North Carolina, County.

I (here give name of the official and his official title), do hereby certify that (here give name of the married woman who executed the instrument), wife of (here give husband's name), personally appeared before me this day and acknowledged the due execution of the foregoing (or annexed) instrument; and the said (here give married woman's name), being by me privately examined, separate and apart from her said husband, touching her voluntary execution of the same, does state that she signed the same freely and voluntarily, without fear or compulsion of her said husband or any other person, and that she does still voluntarily assent thereto.

And I do further certify that it has been made to appear to my satisfaction, and I do find as a fact, that the same is not unreasonable or injurious to her.

Witness my hand and (when an official seal is required by law) official seal, this (day of month), A. D. (year).

(Official seal.)

..... (Signature of officer.)

(1899 c. 235, s. 8; 1901, c. 637; Rev., s. 1003; C. S., s. 3324; 1945, c. 73, s. 14; 1957, c. 1229, s. 2.)

Editor's Note.—The 1957 amendment inserted in the form of acknowledgment the

provision regarding the private examination of the wife.

§ 47-41. Corporate conveyances.

(Name of state)

(County)

I,
 of (Name of officer taking proof) (Official title of officer taking proof)
 of (County) (Name of state) personally appeared before
 (Name of subscribing witness)
 me, and being duly sworn, stated that in his presence

(Name of president, secretary or treasurer of maker)

(signed the foregoing instrument) (acknowledged the execution of the foregoing instrument.) (Strike out the words not applicable.)

WITNESS my hand and official seal, this day of
 , 19.....
 (Month) (Year)

(Signature of official taking proof)

(Official title of official taking proof)

My commission expires

(Date of expiration of official's commission)

(1899, c. 235, s. 17; 1901, c. 2, s. 110; 1905, c. 114; Rev., s. 1005; 1907, c. 927, s. 1; C. S., s. 3326; 1939, c. 20, ss. 1, 2; 1943, c. 172; 1947, c. 75, s. 1; 1949, c. 1224, s. 1; 1953, c. 1078, s. 4; 1955, c. 1345, s. 5.)

Editor's Note.—

The 1953 amendment, effective July 1, 1953, struck out the statutory form appearing at the end of this section, the same being a form for proof of an attested instrument by a subscribing witness, and inserted the above form in lieu thereof.

The 1955 amendment changed such form by striking out "(acknowledged the execution thereof)" and inserting in lieu thereof "(acknowledged the execution of the foregoing instrument)." As the rest of the section was not changed by the amendments, it is not set out.

§ 47-42. Attestation of bank conveyances by secretary or cashier.
 —(a) In all forms of proof and certificates for deeds and conveyances executed by banking corporations, either the secretary or the cashier of said banking corporation shall attest such instruments.

(b) All deeds and conveyances executed prior to February 14, 1939, by banking corporations, where the cashier of said banking corporation has attested said instruments, which deeds and conveyances are otherwise regular, are hereby validated. (1939, c. 20, s. 2½; 1957, c. 783, s. 4.)

Editor's Note.—The 1957 amendment rewrote this section.

§ 47-43.2. Officer's certificate upon proof of instrument by subscribing witness.—When the execution of an instrument is proved by a subscribing witness as provided by G. S. 47-12, the certificate required by G. S. 47-13.1 shall be in substantially the following form:

STATE OF

(Name of state)

COUNTY

I, a
 (Name of officer taking proof) (Official title of officer
 taking proof)
 of COUNTY, certify that
 (Name of state)
 personally appeared before me this day,
 (Name of subscribing witness)
 and being duly sworn, stated that in his presence
 (Name of maker)
 (signed the foregoing instrument) (acknowledged the execution of the foregoing
 instrument.) (Strike out the words not applicable.)

WITNESS my hand and official seal, this the day of
 19.....
 (Month) (Year)

..... (Signature of officer taking proof)

..... (Official title of officer taking proof)

My commission expires
 (Date of expiration of officer's commission)

Provided, however, that when instruments have been recorded upon proof of execution of the instrument by certificate of a judicial officer, showing that execution was proven by oath and examination of the subscribing witness, the date of such examination, and the signature of the officer taking the proof, such proof of execution shall be deemed sufficient on all instruments filed for registration prior to March 15, 1961. (1951, c. 379, s. 3; 1953, c. 1078, s. 3; 1955, c. 1345, s. 6; 1961, c. 237.)

Editor's Note. — The 1953 amendment, effective July 1, 1953, changed the words "signed the foregoing instrument" to read "(signed the foregoing instrument) (acknowledged the execution thereof)"

The 1955 amendment struck out "(acknowledged the execution thereof.)" and inserted in lieu thereof "(acknowledged the execution of the foregoing instrument.)"

The 1961 amendment added the proviso.

§ 47-43.3. Officer's certificate upon proof of instrument by proof of signature of maker. — When the execution of an instrument is proved by proof of the signature of the maker as provided by G. S. 47-12.1 or as provided by G. S. 47-13, the certificate required by G. S. 47-13.1 shall be in substantially the following form:

STATE OF

(Name of state)

COUNTY

I, a
 (Name of officer taking proof) (Official title of officer
 taking proof)
 of COUNTY, certify that
 (Name of state)
 personally appeared before me this day,

(Name of person familiar with
 maker's handwriting)

and being duly sworn, stated that he knows the handwriting of
 and that the signature to the foregoing

(Name of maker)

instrument is the signature of
 (Name of maker)

WITNESS my hand and official seal, this the day of
....., 19.....
(Month) (Year)

.....
(Signature of officer taking proof)

.....
(Official title of officer taking proof)

My commission expires
(Date of expiration of officer's commission)
(1951, c. 379, s. 3.)

§ 47-43.4. Officer's certificate upon proof of instrument by proof of signature of subscribing witness.—When the execution of an instrument is proved by proof of the signature of a subscribing witness as provided by G. S. 47-12.1, the certificate required by G. S. 47-13.1 shall be in substantially the following form:

STATE OF

(Name of state)

COUNTY

I,, a,
(Name of officer taking proof) (Official title of officer taking proof)

of COUNTY,, certify that
(Name of state)

..... personally appeared before me this day,
(Name of person familiar with
handwriting of subscribing witness)

and being duly sworn, stated that he knows the handwriting of
....., and that the signature of,
(Name of subscribing witness) (Name of subscribing witness)
as a subscribing witness to the foregoing instrument is the signautre of

.....
(Name of subscribing witness)

WITNESS my hand and official seal, this the day of
....., 19.....
(Month) (Year)

.....
(Signature of officer taking proof)

.....
(Official title of officer taking proof)

My commission expires
(Date of expiration of officer's commission)
(1951, c. 379, s. 3.)

ARTICLE 4.

Curative Statutes; Acknowledgments; Probates; Registration.

§ 47-48. Clerk's certificate failing to pass on all prior certificates.—When it appears that the clerk of the superior court or other officer having the power to probate deeds, in passing upon deeds or other instruments, and the certificates thereto, having more than one certificate of the same or a prior date, by other officer or officers taking acknowledgment or probating the same, has in his certificate or order mentioned only one or more of the preceding or foregoing certificates or orders, but not all of them, but has admitted the same deed or other instrument to probate, it shall be conclusively presumed that he has passed upon all the certificates of said deed or instrument necessary to the admission of the same to probate, and the certificate of said clerk or other probating officer shall be

deemed sufficient and the probate and registration of said deed or instrument is hereby made and declared valid for all intents and purposes. The provisions of this section shall apply to all instruments recorded in any county of this State prior to January first, one thousand nine hundred and sixty-four. (1917, c. 237; C. S., s. 3330; 1945, c. 808, s. 1; 1965, c. 1001.)

Editor's Note.—

The 1965 amendment substituted "one five" in the second sentence.
thousand nine hundred and sixty-four" for

"one thousand nine hundred and forty-

§ 47-50. Order of registration omitted.—In all cases prior to December 31, 1960, where it appears from the records of the office of the register of deeds of any county in this State that the execution of a deed of conveyance or other instrument by law required or authorized to be registered was duly signed and acknowledged as required by the laws of the State of North Carolina, and the clerk of the superior court of such county or other officer authorized to pass upon acknowledgments and to order registration of instruments has failed either to adjudicate the correctness of the acknowledgment or to order the registration thereof, or both, such registrations are hereby validated and the instrument so appearing in the office of the register of deeds of such county shall be effective to the same extent as if the clerk or other authorized officer had properly adjudged the correctness of the acknowledgment and had ordered the registration of the instrument. (1911, cc. 91, 166; 1913, c. 61; Ex. Sess. 1913, c. 73; 1915, c. 179, s. 1; C. S., s. 3332; 1941, cc. 187, 229; 1949, c. 493; 1957, c. 314; 1961, c. 79.)

Editor's Note.—

The 1957 amendment rewrote this sec-

The 1961 amendment substituted "De-
cember 31, 1960" for "March 3, 1949" in
lines one and two.

§ 47-51. Official deeds omitting seals.—All deeds executed prior to April 1, 1959, by any sheriff, commissioner, receiver executor, executrix, administrator, administratrix, or other officer authorized to execute a deed by virtue of his office or appointment, in which the officer has omitted to affix his seal after his signature, shall not be invalid on account of the omission of such seal. (1907, c. 807; 1917, c. 69, s. 1; C. S., s. 3333; Ex. Sess. 1924, c. 64; 1941, c. 13; 1955, c. 467, ss. 1, 2; 1959, c. 408.)

Editor's Note.—

The 1955 amendment changed the date mentioned in this section from July 1, 1939, to March 12, 1955, and inserted the

words "executor, executrix, administrator,
administratrix."

The 1959 amendment changed the date to "April 1, 1959."

§ 47-53. Probates omitting official seals, etc.—In all cases where the acknowledgment, private examination, or other proof of the execution of any deed, mortgage, or other instrument authorized or required to be registered has been taken or had by or before any commissioner of affidavits and deeds of this State, or clerk or deputy clerk of a court of record, or notary public of this or any other state, territory, or district, and such deed, mortgage, or other instrument has heretofore been recorded in any county in this State, but such commissioner, clerk, deputy clerk, or notary public has omitted to attach his or her official or notarial seal thereto, or if omitted, to insert his or her name in the body of the certificate, or if omitted, to sign his or her name to such certificate, if the name of such officer appears in the body of said certificate or is signed thereto, or it does not appear of record that such seal was attached to the original deed, mortgage, or other instrument, or such commissioner, clerk, deputy clerk, or notary public has certified the same as under his or her "official seal," or "notarial seal," or words of similar import, and no such seal appears of record or where the officer uses "notarial" in his or her certificate and signature shows that "C.S.C." or "clerk of superior court," or similar exchange of capacity, and the word "seal" follows the signature, then all such acknowledgments, private examinations or other proofs of such deeds, mortgages, or other instruments, and the registration

thereof, are hereby made in all respects valid and binding. The provisions of this section apply to acknowledgments, private examinations, or proofs taken prior to January first, one thousand nine hundred and sixty-one: Provided, this section does not apply to pending litigation. (Rev., s. 1012; 1907, cc. 213, 665, 971; 1911, c. 4; 1915, c. 36; C. S., s. 3334; 1929, c. 8, s. 1; 1945, c. 808, s. 2; 1951, c. 1151, s. 1; 1965, c. 500.)

Editor's Note. —

The 1951 amendment inserted "one thousand nine hundred and fifty-one" in lieu of "one thousand nine hundred and forty-five" formerly appearing in the last sentence.

The 1965 amendment substituted "one thousand nine hundred and sixty-one" for "one thousand nine hundred and fifty-one" in the last sentence.

§ 47-53.1. Acknowledgment omitting seal of notary public. — Where any person has taken an acknowledgment as a notary public and has failed to affix his seal and such acknowledgment has been otherwise duly probated and recorded then such acknowledgment is hereby declared to be sufficient and valid: Provided this shall apply only to those deeds and other instruments acknowledged prior to January 1, 1963. (1951, c. 1151, s. 1A; 1953, c. 1307; 1963, c. 412.)

Cross Reference. — As to other sections relating to absence of notarial seal, see §§ 47-102, 47-103.

substituted "1953" for "1951" at the end of the section.

Editor's Note. — The 1953 amendment

The 1963 amendment substituted "1963" for "1953" at the end of the section.

§ 47-54. Registration by register's deputies or clerks. — All registrations of instruments heretofore made in the office of register of deeds of the several counties by the register's deputy or clerk, and signed in the name of the register of deeds by the deputy or clerk, or signed by the deputy in his own name and not in the name of the register of deeds, when such registrations are in all other respects regular, are hereby validated and declared to be of the same force and effect as if signed in the name of the register of deeds by such register. (1911, c. 184, s. 1; C. S., s. 3335; 1953, c. 849; 1963, c. 203.)

Local Modification. — Montgomery: rewrote this section.
1955, c. 1223.

The 1963 amendment, effective April 11, 1963, again rewrote this section.

§ 47-56. Before justices of peace, where clerk's certificate or order of registration defective. — In every case where it appears from the record of the office of any register of deeds in this State that a justice of the peace in this State or any other state of the United States, has taken and certified the proof of any instrument required by the law to be registered, or the privy examination of a married woman thereto, and the deed and certificate have been registered prior to the first day of January, 1963, in the county where the lands described in the instrument are located, without a certificate or with a defective certificate of the clerk of the official character of the justice, or as to the genuineness of his signature, or without the order of registration of the clerk, or his adjudication of due probate, or with a defective adjudication thereof, such proofs, certificates and registration are hereby validated. (1907, c. 83, s. 1; C. S., s. 3337; 1951, c. 35; 1963, c. 1014.)

Editor's Note. — The 1951 amendment substituted "one thousand nine hundred and fifty-one" for "one thousand nine hundred and seven" and deleted the words "but as against creditors or purchasers from donor, bargainor or lessor, only from February first, nineteen hundred and seven" formerly appearing at the end of

the section.

The 1963 amendment inserted the words "or any other state of the United States" near the beginning of the section and substituted "1963" for "one thousand nine hundred and fifty-one" near the middle of the section.

§ 47-71.1. Corporate seal omitted prior to January, 1963. — Any corporate deed, or conveyance of land in this State, made prior to January 1, 1963,

which is defective only because the corporate seal is omitted therefrom is hereby declared to be a good and valid conveyance by such corporation for all purposes and shall be sufficient to pass title to the property therein conveyed as fully as if the said conveyance were executed according to the provisions and forms of law in force in this State at the date of the execution of such conveyance. (1957, c. 500, s. 1; 1963, c. 1015.)

Editor's Note.—The 1963 amendment substituted "1963" for "1957" near the beginning of the section.

§ 47-72. Corporate name not affixed, but signed otherwise prior to January, 1963.—In all cases prior to the first day of January, one thousand nine hundred and sixty-three, where any deed conveying lands purported to be executed by a corporation, but the corporate name was in fact not affixed to said deed, but same was signed by the president and secretary of said corporation, or by the president and two members of the governing body of said corporation, and said deed has been registered in the county where the land conveyed by said deed is located, said defective execution above described shall be and the same is hereby declared to be in all respects valid, and such deed shall be deemed to be in all respects the deed of said corporation. (1919, c. 53, s. 1; C. S., s. 3354; 1927, c. 126; 1963, c. 1094.)

Editor's Note.—The 1963 amendment and sixty-three" for "one thousand nine substituted "one thousand nine hundred hundred and twenty-seven."

§ 47-79. Before deputy clerks of courts of other states.—Where any deed or conveyance of lands in this State, executed prior to January 1, 1923, has been acknowledged by the grantor or the privy examination of any married woman has been taken before the deputy clerk of a court of record of any other state, and the certificate of acknowledgment and privy examination is otherwise sufficient under the laws of this State, except that it appears to have been signed in the name of the clerk of said court, by the deputy clerk, and the seal of the court has been affixed thereto, and such certificate has been duly approved by the clerk of the superior court of this State in the county where the lands conveyed are situated and the instrument ordered to be recorded, such certificate and probate and the registration made thereon are validated, and the conveyance, if otherwise sufficient, is declared valid. (1913, c. 57, ss. 1, 2; C. S., s. 3360; 1951, c. 1134, s. 1.)

Editor's Note.—The 1951 amendment "January first, one thousand nine hundred inserted "January 1, 1923" in lieu of and thirteen".

§ 47-85.1. Further as to acknowledgments, etc., before masters in chancery.—All probates, acknowledgments and privy examinations of deeds, mortgages and conveyances of land, which prior to January 1, 1948 have been taken before masters in equity or masters in chancery in any other state, are hereby declared to be valid, and all registrations of such deeds, mortgages or conveyances upon such probates, acknowledgments and private examinations, or any of them are hereby declared to be sufficient and valid. All such deeds and conveyances and registration thereof and all certified copies of such registrations shall be received in evidence or otherwise used in the same manner and with the same force and effect as other deeds, mortgages and conveyances with probates, acknowledgments, or private examinations made in accordance with the provisions of statutes and laws of this State in force at the time, and as registrations thereof and certified copies of such registrations. (1953, c. 1136.)

§ 47-94. Acknowledgment and registration by officer or stockholder in building and loan or savings and loan association.—All acknowledgments and proofs of execution, including privy examination of married women, of any mortgage or deed of trust executed to secure the payment of any indebtedness to any State or federal building and loan or savings and loan

association prior to the first day of January, one thousand nine hundred and fifty-five, shall not be, nor held to be, invalid by reason of the fact that the clerk of the superior court, justice of the peace, notary public, or other officer taking such acknowledgment, proof of execution or privy examination, was an officer or stockholder in such building and loan association; but such proofs and acknowledgments of all such instruments, and the registration thereof, if in all other respects valid, are hereby declared to be valid.

Nor shall the registration of any such mortgage or deed of trust ordered to be registered by the clerk of the superior court, or by any deputy or assistant clerk of the superior court, be or held to be invalid by reason of the fact that the clerk of the superior court, or deputy, or assistant clerk of the superior court, ordering such mortgages or deeds of trust to be registered was an officer or stockholder in any State or federal building and loan or savings and loan association, whose indebtedness is secured in and by such mortgage or deed of trust. (Ex. Sess. 1924, c. 108; 1929, c. 146, s. 1; 1959, c. 489.)

Editor's Note.—

The 1959 amendment substituted in the first paragraph the words "State or federal building and loan or savings and loan association" for the words "building and loan association." It also substituted therein "fifty-five" for "twenty-nine." The

amendment then struck out in the next to the last line the words "building and loan association" in the second paragraph and inserted in lieu thereof the words "State or federal building and loan or savings and loan association."

§ 47-95. Acknowledgments taken by notaries interested as trustee or holding other office.—In every case where deeds and other instruments have been acknowledged and privy examination of wives had before notaries public, or justices of the peace, prior to January 1, 1959, when the notary public or justice of the peace at the time was interested as trustee in said instrument or at the time was also holding some other office, and the deed or other instrument has been duly probated and recorded, such acknowledgment and privy examination taken by such notary public or justice of the peace is hereby declared to be sufficient and valid. (1923, c. 61; C. S., s. 3366(h); 1931, cc. 166, 438; 1939, c. 321; 1955, c. 696; 1957, c. 1270; 1959, c. 81.)

Editor's Note.—The 1955 amendment substituted in line three "1951" for "1939."

The 1957 amendment substituted "1957"

for "1951" in line three.

The 1959 amendment substituted in line three "1959" for "1957."

§ 47-97.1. Validation of corporate deeds containing error in acknowledgment or probate.—In all cases where the deed of a corporation executed and filed for registration prior to the fifteenth day of June, 1947, is properly executed and properly recorded and there is error in the acknowledgment or probate of said corporation's deed as to the name or names of the officer or officers named therein and error as to the title or titles of the officer or officers named therein, said deed shall be construed to be a deed of the same force and effect as if said probate or acknowledgment were in every way proper. (1951, c. 825.)

§ 47-100. Acknowledgments taken by officer who was grantor.—In all cases where a deed or deeds dated prior to the first day of January, 1951, purporting to convey lands, have been registered in the office of the register of deeds of the county where the lands conveyed in said deed or deeds are located, prior to said first day of January, 1951, and the acknowledgments or proof of execution of such deed or deeds has been taken as to some of the grantors by an officer who was himself one of the grantors named in such deed or deeds, such defective execution, acknowledgment and proof of execution and probate of such deed or deeds thereon and the registration thereof as above described, shall be, and the same are hereby declared to be in all respects valid, and such deed or deeds shall be declared to be in all respects duly executed, probated and recorded to the same effect as if such officer taking such proof or acknowledgment of ex-

cution had not been named as a grantor therein, or in anywise interested therein. (1929, c. 48, s. 1; 1953, c. 986.)

Editor's Note.—

The 1953 amendment substituted "1951" for "1910" in lines two and five.

§ 47-102. Absence of notarial seal.

Cross Reference. — As to absence of notarial seal from acknowledgment, see § 47-53.1.

§ 47-108.5. Validation of certain deeds executed in other states where seal omitted.—All deeds to lands in North Carolina, executed prior to January 1, 1959, without seal attached to the maker's name, which deeds were acknowledged in another state, the laws of which do not require a seal for the validity of a conveyance of real property located in that state, and which deeds have been duly recorded in this State, shall be as valid to all intents and purposes as if the same had been executed under seal. (1949, cc. 87, 296; 1959, c. 797.)

Editor's Note.—

The 1959 amendment substituted "1959" for "1948" in line two.

§ 47-108.10. Validation of registration of plats upon probate in accordance with § 47-30.—The registration of all plats which have prior to February 6, 1953, been admitted to registration upon probate thereof, in accordance with the provisions of § 47-30 of the General Statutes, as amended by § 1 of chapter 47 of the Session Laws of 1953, is hereby validated. (1953, c. 47, s. 2.)

§ 47-108.11. Validation of recorded instruments where seals have been omitted.—In all cases of any deed, deed of trust, mortgage, lien or other instrument authorized or required to be registered in the office of the register of deeds of any county in this State where it appears of record or it appears that from said instrument, as recorded in the office of the register of deeds of any county in the State, there has been omitted from said recorded or registered instrument the word "seal", "notarial seal" and that any of said recorded or registered instruments shows or recites that the grantor or grantors "have hereunto fixed or set their hands and seals" and the signature of the grantor or grantors appears without a seal thereafter or on the recorded or registered instrument or in all cases where it appears there is an attesting clause which recites "signed, sealed and delivered in the presence of", and the signature of the grantor or grantors appears on the recorded or registered instrument without any seal appearing thereafter or of record, then all such deeds, mortgages, deeds of trust, liens or other instruments, and the registration of same in the office of the register of deeds, are hereby declared to be in all respects valid and binding and are hereby made in all respects valid and binding to the same extent as if the word "seal" or "notarial seal" had not been omitted, and the registration and recording of such instruments in the office of the register of deeds in any county in this State are hereby declared to be valid, proper, legal and binding registrations.

This section shall not apply in any respect to any instrument recorded or registered subsequent to January 1, 1959, or to pending litigation or to any such instruments now directly or indirectly involved in pending litigation. (1953, c. 996; 1959, c. 1022.)

Editor's Note.—The 1959 amendment changed the year in the second paragraph from 1933 to 1959. **Cited in** *Page v. Miller*, 252 N. C. 23, 113 S. E. (2d) 52 (1960).

§ 47-108.12. Validation of instruments acknowledged before United States commissioners.—All deeds, mortgages, or other instruments permitted

or required by law to be registered, which prior to January 1, 1933, have been proved or acknowledged before a United States commissioner, or U. S. commissioner, are hereby in all respects validated as to such proof or acknowledgment, and all registrations of such deeds or conveyances, upon such probates, acknowledgments and private examinations, or any of them, are hereby declared to be sufficient and validated. (1953, c. 987.)

§ 47-108.13. Validation of certain instruments registered prior to January 1, 1934.—In all cases where prior to January 1, 1934 instruments by law required or authorized to be registered show the signatures and seal of each of the grantors therein and further show that each of such grantors has appeared before or signed such instruments in the presence of a notary public, justice of the peace or other person duly authorized to take acknowledgments, and such instruments have been ordered registered by the clerk of the superior court or other officer qualified to pass upon probate and admit instruments to registration, and actually put on the books in the office of the register of deeds, as if properly acknowledged, all such instruments and their registrations are hereby validated and made as good and sufficient as though such instruments had been in all respects properly acknowledged: Provided, that this section shall not apply to any privy examination or acknowledgment of a married woman. (1953, c. 1334.)

§ 47-108.14. Conveyances by the United States acting by and through the General Services Administration.—The United States of America, acting by and through the General Services Administration may convey lands and other property in the State of North Carolina which is transferable by deed, quitclaim deed, or other means of conveyances without the Regional Director or other duly authorized agent acting for and on behalf of the United States of America, adopting or placing a "seal", in any form, after the signature of the grantor's agent, or elsewhere on said deed, quitclaim deed, or other instrument, and the conveyances of the United States of America acting by and through the General Services Administration, and executed by its Regional Director or other duly authorized agent, although without a "seal" appearing thereon, shall be in all respects valid and binding to the same extent as if the word "seal" or some other type of seal, appeared after the signature of the grantor's agent, or elsewhere on said conveyances.

All conveyances prior to April 19, 1955, where any deed, quitclaim deed, or other instrument conveying land or other property in the State of North Carolina has been executed by the United States of America, by and through the General Services Administration, and said conveyances are authorized or required to be registered in the office of the register of deeds of any county in this State, and it appears from said instrument, or said instrument as recorded in the office of the register of deeds of any county in this State, that a seal has been omitted from said instruments, that notwithstanding the absence of a seal all such conveyances are hereby declared to be in all respects valid and binding to convey lands and property rights in the State of North Carolina to the grantees named therein, to the same extent as if the word "seal", or a seal in some other form, had appeared after the signature of the grantor's agent, or elsewhere on said conveyances, and the registration and recording of such conveyances in the office of the register of deeds in all counties in this State are hereby declared to be valid, proper, legal and binding registrations to the same extent as if such conveyances were executed under seal. (1955, c. 629, s. 1.)

Editor's Note.—Section 2 of the act inserting the above section provides: "This act shall not apply to pending litigation in which the title to any of the properties of the United States of America, then under the supervision of the General Services Administration, is in question."

§ 47-108.15. Validation of registration of instruments filed before order of registration.—All deeds, deeds of trust, mortgages, chattel mortgages,

contracts and all other instruments required or permitted by law to be registered which have heretofore been accepted for filing and registration by registers of deeds on a date preceding the date of the clerk's order of registration are hereby validated, approved, confirmed and declared to be valid, proper, legal and binding registrations to the same extent as if such instruments had been accepted for filing and registration on the date of or subsequent to the date of the clerk's order of registration. (1957, c. 1430.)

§ 47-108.16. Validation of certain deeds executed by nonresident banks.—All deeds and other conveyances of land in this State executed on behalf of banks not incorporated in the State of North Carolina, by a trust officer thereof, and properly recorded on or before December 31, 1963, which deeds are otherwise regular and valid, are hereby validated. (1965, c. 610.)

ARTICLE 6.

Execution of Powers of Attorney.

§ 47-115. Execution in name of either principal or attorney in fact; indexing in names of both.—Any instrument in writing executed by an attorney in fact shall be good and valid as the instrument of the principal, whether or not said instrument is signed and/or acknowledged in the name of the principal by the attorney in fact or by the attorney in fact designating himself as attorney in fact for the principal or acknowledged in the name of the attorney in fact without naming the principal from which it will appear that it was the purpose of the attorney in fact to be acting for and on behalf of the principal mentioned or referred to in the instrument. This section shall not affect any pending litigation or the status of any matter heretofore determined by the courts. This section shall apply to all such instruments heretofore or hereafter executed. Registers of deeds shall be required to index all such instruments filed for registration both in the name of the principal or principals executing the power of appointment and in the name of the attorney in fact executing the instrument: Provided, that instruments heretofore registered and indexed only in the name of the attorney in fact shall be valid and in all respects binding upon the principal or principals insofar as validity of registration is concerned. (1945, c. 204; 1959, c. 210.)

Editor's Note.—The 1959 amendment rewrote the first sentence.

§ 47-115.1. Appointment of attorney in fact which may be continued in effect notwithstanding incapacity or mental incompetence of the principal therein.—(a) Any person twenty-one (21) years of age or more and mentally competent may as principal execute a power of attorney pursuant to the provisions of this section which shall continue in effect until revoked as hereinafter provided, notwithstanding any incapacity or mental incompetence of such principal which occurs after the date of the execution and acknowledgment of the power of attorney.

(b) The power of attorney shall be in writing, signed by the principal under seal, acknowledged by the principal before an officer authorized to take the acknowledgment of deeds whose authority is recognized under the law of North Carolina in effect at the time of such acknowledgment, and delivered to the attorney in fact.

(c) The power of attorney shall contain a statement that it is executed pursuant to the provisions of this section, or shall contain such other language as shall clearly indicate the intention that the power of attorney shall continue in effect notwithstanding the incapacity or incompetence of the principal.

(d) No power of attorney executed pursuant to the provisions of this section shall be valid but from the time of registration thereof in the office of the reg-

ister of deeds of that county in this State designated in the power of attorney, or if no place of registration is designated, in the office of the register of deeds of the county in which the principal has his legal residence at the time of such registration or, if the principal has no legal residence in this State at the time of registration or the attorney in fact is uncertain as to the principal's residence in this State, in some county in the State in which the principal owns property or the county in which one or more of the attorneys in fact reside. Within thirty (30) days after the registration of the power of attorney as above provided, the attorney in fact shall file with the clerk of the superior court in the county of such registration a copy of the power of attorney, but failure to file with the clerk shall not affect validity of the instrument.

(e) Every power of attorney executed pursuant to the provisions of this section shall be revoked by:

- (1) The death of the principal; or
- (2) The appointment of a guardian or trustee of the property in this State of the principal, and the registration of a certified copy of such appointment in the office of the register of deeds where the power of attorney has been registered; or
- (3) Registration in the office of the register of deeds where the power of attorney has been registered of an instrument of revocation executed and acknowledged by the principal while he is not incapacitated or mentally incompetent, or by the registration in such office of an instrument of revocation executed by any person or corporation who is given such power of revocation in the power of attorney, with proof of service thereof in either case on the attorney in fact in the manner prescribed for service of summons in civil actions.

(f) Any person dealing in good faith with an attorney in fact acting under a power of attorney executed and then in effect under this section shall be protected to the full extent of the powers conferred upon such attorney in fact, and no person so dealing with such attorney in fact shall be responsible for the misapplication of any money or other property paid or transferred to such attorney in fact.

(g) Every attorney in fact acting under a power of attorney in effect under this section shall keep full and accurate records of all transactions in which he acts as agent of the principal and of all property of the principal in his hands and the disposition thereof.

(h) If the power of attorney provides for rendering inventories and accounts, such provisions shall govern. Otherwise, the attorney in fact shall file in the office of the clerk of the superior court of the county in which the power of attorney is registered, inventories of the property of the principal in his hands and annual and final accounts of the receipt and disposition of property of the principal and of other transactions in behalf of the principal. The power of the clerk to enforce the filing and his duties in respect to audit and recording of such accounts shall be the same as those in respect to the accounts of administrators, but the fees and charges of the clerk shall be computed or fixed only with relation to property of the principal required to be shown in the accounts and inventories. The fees and charges of the clerk shall be paid by the attorney in fact out of the principal's money or other property and allowed in his accounts. If the powers of an attorney in fact shall terminate for any reason whatever, he, or his executors or administrators, shall have the right to have a judicial settlement of a final account by any procedure available to executors, administrators or guardians.

(i) A power of attorney executed under this section may contain any provisions, not unlawful, relating to the appointment, resignation, removal and substitution of an attorney in fact, and to the rights, powers, duties and responsibilities of the attorney in fact.

(j) If all attorneys in fact named in the instrument or substituted shall die,

or cease to exist, or shall become incapable of acting, and all methods for substitution provided in the instrument have been exhausted, such power of attorney shall cease to be effective. Any substitution by a person authorized to make it shall be in writing signed and acknowledged by such person. Notice of every other substitution shall be in writing signed and acknowledged by the person substituted. No substitution or notice shall be effective until it has been recorded in the office of the register of deeds of the county in which the power of attorney has been recorded. (1961, c. 341, s. 1.)

ARTICLE 7.

Private Examination of Married Women Abolished.

§ 47-116: Transferred to § 47-14.1 by Session Laws 1951, c. 893.

ARTICLE 8.

Memoranda of Leases and Options.

§ 47-117. Forms do not preclude use of others; adaptation of forms.

—(a) The form prescribed in this article does not exclude the use of other forms which are sufficient in law.

(b) The prescribed form may be adapted to fit the various situations in which the grantors or grantees are individuals, firms, associations, corporations, or otherwise, or combinations thereof. (1961, c. 1174.)

Editor's Note.—The act inserting this article is effective as of Oct. 1, 1961.

§ 47-118. Forms of registration of lease. — (a) A lease of land or land and personal property may be registered by registering a memorandum thereof which shall set forth:

- (1) The names of the parties thereto;
- (2) A description of the property leased;
- (3) The term of the lease, including extensions, renewals and options to purchase, if any; and
- (4) Reference sufficient to identify the complete agreement between the parties.

Such a memorandum may be in substantially the following form:

MEMORANDUM OF LEASE

(Name and address or description of lessor or lessors)

hereby lease(s) to (insert name of lessee)

(Name and address or description of lessee or lessees) for a term beginning the day of, 19....., and con-
(Month) (Year)

tinuing for a maximum period of (Month) / (Year), including extensions and renewals, if any, the following property:

(Here describe the property)

(If applicable: [There exists an option to purchase with respect to this leased property, in favor of the lessee which expires the day of (Month)

19....., which is set forth at large in the complete agreement between the
(Year) _____

(Teal) parties[.]

the day of, 19....., are hereby incorporated in this
 (Month) (Year)
 memorandum.

..... [Seal]
 (Lessor)
 [Seal]
 (Lessee)

(Acknowledgment as required by law)

(b) If the provisions of the lease make it impossible or impractical to state the maximum period of the lease because of conditions, renewals and extensions, or otherwise, then the memorandum of lease shall state in detail all provisions concerning the term of the lease as fully as set forth in the written lease agreement between the parties.

(c) Registration of a memorandum of lease pursuant to subsections (a) and (b) of this section, shall have the same legal effect as if the written lease agreement had been registered in its entirety. (1961, c. 1174.)

§ 47-119. Form of memorandum for option to purchase real estate.—An option to purchase real estate may be registered by registering a memorandum thereof which shall set forth:

- (1) The names of the parties thereto;
- (2) A description of the property which is subject to the option;
- (3) The expiration date of the option;
- (4) Reference sufficient to identify the complete agreement between the parties.

Such a memorandum may be in substantially the following form:

NORTH CAROLINA

..... COUNTY

In consideration of, the receipt of which
 (Set out consideration)
 is hereby acknowledged, does hereby
 (Name and address of person selling option)
 give and grant to
 (Name and address of person buying option)
 the right and option to purchase the following property:
 (Here describe property).

This option shall expire on the day of, 19.....

The provisions set forth in a written option agreement between the parties dated the day of, 19...., are hereby incorporated in this memorandum.

Witness our hand(s) and seal(s) this day of, 19.....

..... (Seal)
 (Seal)

(1961, c. 1174.)

§ 47-120. Memorandum as notice.—Such memorandum of an option to purchase real estate, or lease as proposed by G. S. 47-118 or 47-119, when executed, acknowledged, delivered and registered as required by law, shall be as good and sufficient notice, and have the same force and effect as if the written lease or option to purchase real estate had been registered in its entirety. (1961, c. 1174.)

Chapter 47A.

Unit Ownership Act.

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	47A-27. Zoning regulations governing condominium projects.
	47A-28. Persons subject to chapter, declaration and bylaws; effect of decisions of association of unit owners.

§ 47A-1. Short title.—This chapter shall be known as the "Unit Ownership Act." (1963, c. 685, s. 1.)

§ 47A-2. Declaration creating unit ownership; recordation. — Unit ownership may be created by an owner or the co-owners of a building by an express declaration of their intention to submit such property to the provisions of the chapter, which declaration shall be recorded in the office of the register of deeds of the county in which the property is situated. (1963, c. 685, s. 2.)

§ 47A-3. Definitions.—Unless it is plainly evident from the context that a different meaning is intended, as used herein:

- (1) "Declaration" means the instrument, duly recorded, by which the property is submitted to the provisions of this chapter, as hereinafter provided, and such declaration as from time to time may be lawfully amended.
- (2) "Unit" or "condominium unit" means an enclosed space consisting of one or more rooms occupying all or part of a floor in a building of one or more floors or stories regardless of whether it be designed for residence, for office, for the operation of any industry or business, or for any other type of independent use and shall include such acces-

sory spaces and areas as may be described in the declaration, such as garage space, storage space, balcony, terrace or patio, provided it has a direct exit to a thoroughfare or to a given common space leading to a thoroughfare.

- (3) "Unit designation" means the number, letter, or combination thereof designating the unit in the declaration.
- (4) "Unit owner" means a person, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns a unit within the building.
- (5) "Association of unit owners" means all of the unit owners acting as a group in accordance with the bylaws and declaration.
- (6) "Condominium" means the ownership of single units in a multi-unit structure with common areas and facilities.
- (7) "Common areas and facilities," unless otherwise provided in the declaration or lawful amendments thereto, means and includes:
 - a. The land on which the building stands and such other land and improvements thereon as may be specifically included in the declaration, except any portion thereof included in a unit;
 - b. The foundations, columns, girders, beams, supports, main walls, roofs, halls, corridors, lobbies, stairs, stairways, fire escapes, and entrances and exits of the building;
 - c. The basements, yards, gardens, parking areas and storage spaces;
 - d. The premises for the lodging of janitors or persons in charge of property;
 - e. Installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning and incinerating;
 - f. The elevators, tanks, pumps, motors, compressors, ducts, and in general, all apparatus and installations existing for common use;
 - g. Such community and commercial facilities as may be provided for in the declaration; and
 - h. All other parts of the property necessary or convenient to its existence, maintenance and safety, or normally in common use.
- (8) "Limited common areas and facilities" means and includes those common areas and facilities which are agreed upon by all the unit owners to be reserved for the use of a certain number of units to the exclusion of the other units, such as special corridors, stairways and elevators, sanitary services common to the units of a particular floor, and the like.
- (9) "Common expenses" means and includes:
 - a. All sums lawfully assessed against the unit owners by the association of unit owners;
 - b. Expenses of administration, maintenance, repair or replacement of the common areas and facilities;
 - c. Expenses agreed upon as common expenses by the association of unit owners;
 - d. Expenses declared common expenses by the provisions of this chapter, or by the declaration or the bylaws;
 - e. Hazard insurance premiums, if required.
- (10) "Common profits" means the balance of all income, rents, profits, and revenues from the common areas and facilities remaining after the deductions of the common expenses.
- (11) "Majority" or "majority of unit owners" means the owners of more than fifty per cent (50%) of the aggregate interest in the common areas and facilities as established by the declaration assembled at a duly called meeting of the unit owners.

- (12) "Recordation" means to file of record in the office of the county register of deeds in the county where the land is situated, in the manner provided by law for recordation of instruments affecting real estate.
- (13) "Person" means individual, corporation, partnership, association, trustee, or other legal entity.
- (14) "Property" means and includes the land, the building, all improvements and structures thereon and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been or are intended to be submitted to the provisions of this chapter. (1963, c. 685, s. 3.)

§ 47A-4. Property subject to chapter.—This chapter shall be applicable only to property, the full owner or all of the owners of which submit the same to the provisions hereof by duly executing and recording a declaration as herein-after provided. (1963, c. 685, s. 4.)

§ 47A-5. Nature and incidents of unit ownership.—Unit ownership as created and defined in this chapter shall vest in the holder exclusive ownership and possession with all the incidents of real property. A condominium unit in the building may be individually conveyed, leased and encumbered and may be inherited or devised by will, as if it were solely and entirely independent of the other condominium units in the building of which it forms a part. Such a unit may be held and owned by more than one person either as tenants in common or tenants by the entirety or in any other manner recognized under the laws of this State. (1963, c. 685, s. 5.)

§ 47A-6. Undivided interests in common areas and facilities; ratio fixed in declaration; conveyance with unit.—(a) Each unit owner shall be entitled to an undivided interest in the common areas and facilities in the ratio expressed in the declaration. Such ratio shall be in the approximate relation that the fair market value of the unit at the date of the declaration bears to the then aggregate fair market value of all the units having an interest in said common areas and facilities.

(b) The ratio of the undivided interest of each unit owner in the common areas and facilities as expressed in the declaration shall have a permanent character and shall not be altered except with the unanimous consent of all unit owners expressed in an amended declaration duly recorded.

(c) The undivided interest in the common areas and facilities shall not be separated from the unit to which it appertains and shall be deemed conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument. (1963, c. 685, s. 6.)

§ 47A-7. Common areas and facilities not subject to partition or division.—The common areas and facilities shall remain undivided and no unit owner or any other person shall bring any action for partition or division of any part thereof, unless the property has been removed from the provisions of this chapter as provided in §§ 47A-16 and 47A-25. Any covenant to the contrary shall be null and void. This restraint against partition shall not apply to the individual condominium unit. (1963, c. 685, s. 7.)

§ 47A-8. Use of common areas and facilities.—Each unit owner may use the common areas and facilities in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other unit owners. (1963, c. 685, s. 8.)

§ 47A-9. Maintenance, repair and improvements to common areas and facilities; access to units for repairs.—The necessary work of maintenance, repair, and replacement of the common areas and facilities and the making of any additions or improvements thereto shall be carried out only as pro-

vided herein and in the bylaws. The association of unit owners shall have the irrevocable right, to be exercised by the manager or board of directors, or other managing body as provided in the bylaws, to have access to each unit from time to time during reasonable hours as may be necessary for the maintenance, repair or replacement of any of the common areas and facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the common areas and facilities or to another unit or units. (1963, c. 685, s. 9.)

§ 47A-10. Compliance with bylaws, regulations and covenants; damages; injunctions.—Each unit owner shall comply strictly with the bylaws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in the declaration or in the deed to his unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both, maintainable by the manager or board of directors on behalf of the association of unit owners or, in a proper case, by an aggrieved unit owner. (1963, c. 685, s. 10.)

§ 47A-11. Unit owners not to jeopardize safety of property or impair easements.—No unit owner shall do any work which would jeopardize the soundness or safety of the property or impair any easement or hereditament without in every such case the unanimous consent of all the other unit owners affected being first obtained. (1963, c. 685, s. 11.)

§ 47A-12. Unit owners to contribute to common expenses; distribution of common profits.—The unit owners are bound to contribute pro rata, in the percentages computed according to § 47A-6 of this chapter, toward the expenses of administration and of maintenance and repair of the general common areas and facilities and, in proper cases of the limited common areas and facilities, of the building and toward any other expense lawfully agreed upon. No unit owner may exempt himself from contributing toward such expense by waiver of the use or enjoyment of the common areas and facilities or by abandonment of the unit belonging to him.

Provided, however, that the common profits of the property, if any, shall be distributed among the unit owners according to the percentage of the undivided interest in the common areas and facilities. (1963, c. 685, s. 12.)

§ 47A-13. Declaration creating unit ownership; contents; recordation.—The declaration creating and establishing unit ownership as provided in § 47A-3 of this chapter, shall be recorded in the office of the county register of deeds and shall contain the following particulars:

- (1) Description of the land on which the building and improvements are or are to be located.
- (2) Description of the building, stating the number of stories and basements, the number of units, and the principal materials of which it is constructed.
- (3) The unit designation of each unit, and a statement of its location, approximate area, number of rooms, and immediate common area to which it has access, and any other data necessary for its proper identification.
- (4) Description of the general common areas and facilities and the proportionate interest of each unit owner therein.
- (5) Description of the limited common areas and facilities, if any, stating what units shall share the same and in what proportion.
- (6) Statement of the purpose for which the building and each of the units are intended and restricted as to use.
- (7) The name of a person to receive service of process in the cases herein-after provided, together with the residence or the place of business

of such person which shall be within the city and county in which the building is located.

- (8) Any further details in connection with the property which the person executing the declaration may deem desirable to set forth consistent with this chapter.
- (9) The method by which the declaration may be amended, consistent with the provisions of this chapter. (1963, c. 685, s. 13.)

§ 47A-14. Deeds conveying units; recordation; contents. — Deeds conveying a unit ownership shall be recorded in the office of the register of deeds in the county in which the land and building is located and shall contain the following particulars:

- (1) Description of the land as provided in § 47A-13 of this chapter, including the book and page numbers and the date of recording of the declaration.
- (2) The unit designation as contained in the declaration and any other data necessary for its proper identification.
- (3) A clear expression of the use for which the unit is intended and restrictions on its use.
- (4) The percentage of undivided interest appertaining to the unit in the common areas and facilities.
- (5) Any further details which the grantor and grantees may deem desirable to set forth consistent with the declaration and this chapter. (1963, c. 685, s. 14.)

§ 47A-15. Plans of building to be attached to declaration; recordation; certificate of architect or engineer. — There shall be attached to the declaration, at the time it is filed for record, a full and exact copy of the plans of the building, which copy of plans shall be entered of record along with the declaration. Said plans shall show graphically all particulars of the building, including, but not limited to, the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, stating the name of the building or that it has no name, area and location of the common areas and facilities affording access to each unit, and such plans shall bear the verified statement of a registered architect or licensed professional engineer certifying that it is an accurate copy of portions of the plans of the building as filed with and approved by the municipal or other governmental subdivision having jurisdiction over the issuance of permits for the construction of buildings. If such plans do not include a verified statement by such architect or engineer that such plans fully and accurately depict the layout, location, ceiling and floor elevations, unit numbers and dimensions of the units, as built, there shall be recorded prior to the first conveyance of any unit an amendment to the declaration to which shall be attached a verified statement of a registered architect or licensed professional engineer certifying that the plans theretofore filed, or being filed simultaneously with such amendment, fully depict the layout, ceiling and floor elevations, unit numbers and dimensions of the units as built. Such plans shall be kept by the register of deeds in a separate file, indexed in the same manner as a conveyance entitled to record, numbered serially in the order of receipt, each designated "Unit Ownership", with the name of the building, if any, and each containing a reference to the book and page numbers and date of the recording of the declaration. (1963, c. 685, s. 15.)

§ 47A-16. Termination of unit ownership; consent of lienholders; recordation of instruments. — (a) All of the unit owners may remove a property from the provisions of this chapter by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the percentage of the undivided interest of the unit owner in the property as hereinafter provided.

(b) Upon removal of the property from the provisions of this chapter, the property shall be deemed to be owned as tenants in common by the unit owners. The undivided interest in the property owned as tenants in common which shall appertain to each unit owner shall be the percentage of the undivided interest previously owned by such unit owner in the common areas and facilities. (1963, c. 685, s. 16.)

§ 47A-17. Termination of unit ownership; no bar to re-establishment.—The removal provided for in the preceding section shall in no way bar the subsequent resubmission of the property to the provisions of this chapter. (1963, c. 685, s. 17.)

§ 47A-18. Bylaws; annexed to declaration and first deed to unit; amendments.—The administration of every property shall be governed by by-laws, a true copy of which shall be annexed to the declaration and to the first deed of each unit. No modification of or amendment to the bylaws shall be valid, unless set forth in an amendment to the declaration and such amendment is duly recorded. (1963, c. 685, s. 18.)

§ 47A-19. Bylaws; contents.—The bylaws shall provide for the following:

- (1) Form of administration, indicating whether this shall be in charge of an administrator, manager, or of a board of directors or board of administration, independent corporate body, or otherwise, and specifying the powers, manner of removal, and, where proper, the compensation thereof.
- (2) Method of calling or summoning the unit owners to assemble; what percentage, if other than a majority of unit owners, shall constitute a quorum; who is to preside over the meeting and who will keep the minute book wherein the resolutions shall be recorded.
- (3) Maintenance, repair and replacement of the common areas and facilities and payments therefor, including the method of approving payment vouchers.
- (4) Manner of collecting from the unit owners their share of the common expenses.
- (5) Designation and removal of personnel necessary for the maintenance, repair and replacement of the common areas and facilities.
- (6) Method of adopting and of amending administrative rules and regulations governing the details of the operation and use of the common areas and facilities.
- (7) Such restrictions on and requirements respecting the use and maintenance of the units and the use of the common areas and facilities, not set forth in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common areas and facilities by the several unit owners.
- (8) The percentage of votes required to amend the bylaws, and a provision that such amendment shall not become operative unless set forth in an amended declaration and duly recorded.
- (9) A provision that all unit owners shall be bound to abide by any amendment upon the same being passed and duly set forth in an amended declaration, duly recorded.
- (10) Other provisions as may be deemed necessary for the administration of the property consistent with this chapter. (1963, c. 685, s. 19.)

§ 47A-20. Records of receipts and expenditures; availability for examination; annual audit.—The manager or board of directors, or other form of administration provided in the bylaws, as the case may be, shall keep detailed, accurate records in chronological order of the receipts and expenditures affecting the common areas and facilities, specifying and identifying the maintenance and

repair expenses of the common areas and facilities and any other expense incurred. Both said book and the vouchers accrediting the entries thereupon shall be available for examination by all the unit owners, their duly authorized agents or attorneys, at convenient hours on working days that shall be set and announced for general knowledge. All books and records shall be kept in accordance with good and accepted accounting practices and an outside audit shall be made at least once a year. (1963, c. 685, s. 20.)

§ 47A-21. Units taxed separately.—Each condominium unit and its percentage of undivided interest in the common areas and facilities shall be deemed to be a parcel and shall be separately assessed and taxed by each assessing unit and special district for all types of taxes authorized by law including but not limited to special ad valorem levies and special assessments. Each unit holder shall be liable solely for the amount of taxes against his individual unit and shall not be affected by the consequences resulting from the tax delinquency of other unit holders. Neither the building, the property nor any of the common areas and facilities shall be deemed to be a parcel. (1963, c. 685, s. 21.)

§ 47A-22. Liens for unpaid common expenses; recordation; priorities; foreclosure.—(a) Any sum assessed by the association of unit owners for the share of the common expenses chargeable to any unit, and remaining unpaid for a period of thirty (30) days or longer, shall constitute a lien on such unit when filed of record in the office of the clerk of superior court of the county in which the property is located in the manner provided therefor by article 8 of chapter 44 of the General Statutes. Upon the same being duly filed, such lien shall be prior to all other liens except the following:

- (1) Assessments, liens and charges for real estate taxes due and unpaid on the unit;
- (2) All sums unpaid on deeds of trust, mortgages and other incumbrances duly of record against the unit prior to the docketing of the aforesaid lien.
- (3) Materialmen's and mechanics' liens.

(b) Provided the same is duly filed in accordance with the provisions contained in subsection (a) of this section, a lien created by nonpayment of a unit owner's pro-rata share of the common expenses may be foreclosed by suit by the manager or board of directors, acting on behalf of the unit owners, in like manner as a deed of trust or mortgage of real property. In any such foreclosure the unit owner shall be required to pay a reasonable rental for the unit, if so provided in the bylaws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the same. The manager or board of directors, acting on behalf of the unit owners shall have power, unless prohibited by the declaration, to bid in the unit at foreclosure sale, and to acquire and hold, lease, mortgage and convey the same. A suit to recover a money judgment for unpaid common expenses shall be maintainable without foreclosing or waiving the lien securing the same.

(c) Where the mortgagee of a first mortgage of record or other purchaser of a unit obtains title to the unit as a result of foreclosure of the first mortgage, such purchaser, his successors and assigns, shall not be liable for the share of the common expenses or assessments by the association of unit owners chargeable to such unit which became due prior to the acquisition of title to such unit by such purchaser. Such unpaid share of common expenses or assessments shall be deemed to be common expenses collectible from all of the unit owners including such purchaser, his successors and assigns. (1963, c. 685, s. 22.)

§ 47A-23. Liability of grantor and grantee of unit for unpaid common expenses.—The grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the latter for his proportionate

share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. However, any such grantee shall be entitled to a statement from the manager or board of directors, as the case may be, setting forth the amount of the unpaid assessments against the grantor and such grantee shall not be liable for, nor shall the unit conveyed be subject to a lien for, any unpaid assessments in excess of the amount therein set forth. (1963, c. 685, s. 23.)

§ 47A-24. Insurance on property; right to insure units.—The manager of the board of directors, or other managing body, if required by the declaration, bylaws or by a majority of the unit owners, shall have the authority to, and shall, obtain insurance for the property against loss or damage by fire and such other hazards under such terms and for such amounts as shall be required or requested. Such insurance coverage shall be written on the property in the name of such manager or of the board of directors of the association of unit owners, as trustee for each of the unit owners in the percentages established in the declaration. The trustee so named shall have the authority on behalf of the unit owners to deal with the insurer in the settlement of claims. The premiums for such insurance on the building shall be deemed common expenses. Provision for such insurance shall be without prejudice to the right of each unit owner to insure his own unit for his benefit. (1963, c. 685, s. 24.)

§ 47A-25. Damage to or destruction of property; repair or restoration; partition sale on resolution not to restore.—Except as hereinafter provided, damage to or destruction of the building shall be promptly repaired and restored by the manager or board of directors, or other managing body, using the proceeds of insurance on the building for that purpose, and unit owners shall be liable for assessment for any deficiency; provided, however, if the building shall be more than two-thirds ($\frac{2}{3}$ rd) destroyed by fire or other disaster and the owners of three-fourths ($\frac{3}{4}$ ths) of the building duly resolve not to proceed with repair or restoration, then and in that event:

- (1) The property shall be deemed to be owned as tenants in common by the unit owners;
- (2) The undivided interest in the property owned by the unit owners as tenants in common which shall appertain to each unit owner shall be the percentage of undivided interest previously owned by such owner in the common areas and facilities;
- (3) Any liens affecting any of the units shall be deemed to be transferred in accordance with the existing priorities to the percentage of the undivided interest of the unit owner in the property as provided herein; and
- (4) The property shall be subject to an action for sale for partition at the suit of any unit owner, in which event the net proceeds of sale, together with the net proceeds of insurance policies, if any, shall be considered as one fund and shall be divided among all the unit owners in proportion to their respective undivided ownership of the common areas and facilities, after first paying off, out of the respective shares of unit owners, to the extent sufficient for that purpose, all liens on the unit of each unit owner. (1963, c. 685, s. 25.)

§ 47A-26. Actions as to common interests; service of process on designated agent; exhaustion of remedies against association.—Without limiting the rights of any unit owner, actions may be brought by the manager or board of directors, in either case in the discretion of the board of directors, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any course of action relating to the common areas and facilities or more than one unit. Service of process on two or more unit owners in any action relating to the common areas and facilities or more than one unit may

be made on the person designated in the declaration to receive service of process. Any individual, corporation, partnership, association, trustee, or other legal entity claiming damages for injuries without any participation by a unit owner shall first exhaust all available remedies against the association of unit owners prior to proceeding against any unit owner individually. (1963, c. 685, s. 26.)

§ 47A-27. Zoning regulations governing condominium projects.— Whenever they deem it proper, the planning and zoning commission or any county or municipality may adopt supplemental rules and regulations governing a condominium project established under this chapter in order to implement this program. (1963, c. 685, s. 27.)

§ 47A-28. Persons subject to chapter, declaration and bylaws; effect of decisions of association of unit owners.—(a) All unit owners, tenants of such owners, employees of owners and tenants, or any other persons that may in any manner use the property or any part thereof submitted to the provisions of this chapter, shall be subject to this chapter and to the declaration and bylaws of the association of unit owners adopted pursuant to the provisions of this chapter.

(b) All agreements, decisions and determinations lawfully made by the association of unit owners in accordance with the voting percentages established in the chapter, declaration or bylaws, shall be deemed to be binding on all unit owners. (1963, c. 685, s. 28.)

Chapter 48.

Adoption of Minors.

Sec.

48-6.1. When consent of mother of illegitimate child not necessary.
48-23. Legal effect of final order of adoption.

Sec.

48-25. Record and information not to be made public; violation a misdemeanor.

§ 48-1. Legislative intent; construction of chapter.

Editor's Note.—

For case law survey on adoption, see 41 N. C. Law Rev. 458.

scribed by this chapter. In re Custody of Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

Quoted in Hicks v. Russell, 256 N. C. 34, 123 S. E. (2d) 214 (1961).

Chapter Exclusive.—The only procedure for the adoption of minors is that pre-

§ 48-2. Definitions.

(3a) For the purpose of this chapter, an abandoned child shall be any child under the age of eighteen years who has been willfully abandoned at least six consecutive months immediately preceding institution of an action or proceeding to declare the child to be an abandoned child. A child may be willfully abandoned by his or her legal or natural father, within the meaning of this section, if the mother of the child had been willfully abandoned by and was living separate and apart from the father at the time of the child's birth although the father may not have known of such birth; but in any event said child must be over the age of three months and under the age of eighteen years at the time of institution of the action or proceeding to declare the child to be an abandoned child.

(3b) In addition to the definition of abandonment in (3a) above, an abandoned child, for purposes of this chapter, shall be a child under eighteen years of age who has been placed in the care of a child caring institution or foster home, and whose parent, parents, or guardian of the person has failed substantially and continuously for a period of more than one year to maintain contact with such child, and has willfully failed for such period to contribute ade-

quate support to such child, although physically and financially able to do so. In order to find an abandonment under this subsection, the court must find the foregoing and the court must also find that diligent but unsuccessful efforts have been made on the part of the institution or a child placing agency to encourage the parent, parents, or guardian of the person of the child to strengthen the parental or custodial relationship to the child.

(5) "Stepchild" means the child of one spouse by a former union, whether or not such child was born in wedlock. (1949, c. 300; 1953, c. 880; 1957, c. 778, s. 1; 1961, c. 241.)

Editor's Note. — The 1953 amendment added subsection (5). The 1957 amendment added the second sentence of subsection (3), now subsection (3a).

The 1961 amendment redesignated subsection (3) as (3a) and added subsection (3b).

As the rest of the section was not affected by the amendments only subsections (3a), (3b) and (5) are set out.

"Abandonment" Defined. — "Abandonment" imports any willful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

"Abandonment" has also been defined as willful neglect and refusal to perform the natural and legal obligations of parental care and support. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Abandonment Must Be Willful. — Willfulness is as much an element of abandonment within the meaning of this section as it is of the crime of abandonment described in G. S. 14-322 and 14-326. *In re Adoption of Hoose*, 243 N. C. 589, 91 S. E. (2d) 555 (1956).

Abandonment requires a willful intent to escape parental responsibility and conduct in effectuation of such intent. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Willful intent is a question of fact to be determined from the evidence. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Mere Failure to Contribute to Support of Child Does Not Constitute Abandonment. — A mere failure of the parent of a minor child in the custody of a third person to contribute to its support does not in and of itself constitute abandonment, since explanations could be made which would be inconsistent with a willful intent to abandon. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

But Continued Willful Failure to Support Is Evidence of Abandonment. — A con-

tinued willful failure to perform the parental duty to support and maintain a child would be evidence that a parent had relinquished his claim to the child. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

It Is Not Necessary That Parent Absent Himself from Child Continuously. — To constitute an abandonment within the meaning of this section it is not necessary that a parent absent himself continuously from the child for the specified six months, nor even that he cease to feel any concern for its interest. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

If His Conduct Shows Intent to Forego All Obligations and Relinquish All Claims. — If the parent's conduct over the six months period evinces a settled purpose and a willful intent to forego all parental duties and obligations and to relinquish all parental claims to the child there has been abandonment within the meaning of this section. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Conduct Amounting to Abandonment. — If a parent withdraws his presence, his love, his care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Sufficient Allegation of Abandonment. — *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Instruction. — An instruction to the jury explaining that "willful means that the abandonment would be without just cause or excuse, unjustifiable and wrong; that the respondent had a purpose to do it without authority, careless of whether he had a right or not," was sufficient. *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Quoted in *Hicks v. Russell*, 256 N. C. 34, 123 S. E. (2d) 214 (1961).

Cited in *In re Custody of Simpson*, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-3. Who may be adopted. — Any minor child, irrespective of place of birth or place of residence, and whether or not a citizen of the United States,

may be adopted in accordance with the provisions of this chapter. (1949, c. 300; 1957, c. 778, s. 2.)

Editor's Note.—The 1957 amendment inserted the words "and whether or not a citizen of the United States."

For article on interstate and foreign

adoptions in North Carolina, see 40 N. C. Law Rev. 691.

Stated in *Wilson v. Anderson*, 232 N. C. 212, 59 S. E. (2d) 836 (1950).

§ 48-4. Who may adopt children.

(c) Provided further, that the petitioner or petitioners shall have resided in North Carolina, or on federal territory within the boundaries of North Carolina, for one year next preceding the filing of the petition unless the petition is for the adoption of a stepchild as provided in subsection (b). In cases where the petition is for the adoption of a stepchild, the petitioner must be in fact residing in North Carolina, or on a federal territory within the boundaries of North Carolina, at the time the petition is filed. (1949, c. 300; 1963, c. 699.)

Editor's Note.—The 1963 amendment added that part of subsection (c) relating to the adoption of a stepchild. As only subsection (c) was affected by the amendment the rest of the section is not set out.

For article on interstate and foreign adoptions in North Carolina, see 40 N. C. Law Rev. 691.

Stated in *Wilson v. Anderson*, 232 N. C. 212, 59 S. E. (2d) 836 (1950).

§ 48-5. Parents, etc., not necessary parties to adoption proceedings upon finding of abandonment.—(a)

In all cases where a court of competent jurisdiction, including a juvenile court or a domestic relations court, has declared a child to be an abandoned child, the parent, parents, or guardian of the person, declared guilty of such abandonment shall not be necessary parties to any proceeding under this chapter nor shall their consent be required.

(b) In the event that a court of competent jurisdiction has not heretofore declared the child to be an abandoned child, then on written notice of not less than ten days to the parent, parents, or guardian of the person, the court in the adoption proceeding is hereby authorized to determine whether an abandonment has taken place; provided, that if the child is under the jurisdiction and control of a juvenile court or a domestic relations court, such determination of abandonment shall be made only by that court having jurisdiction, after due notice to the parent, parents or guardian of the person of the child and to any person or agency having the custody or supervision of the child under the order of such court.

(1957, c. 90; c. 778, s. 3.)

Editor's Note.—

The first 1957 amendment inserted in subsection (a) the words "including a juvenile court or a domestic relations court." The second 1957 amendment added the proviso to subsection (b). As only subsections (a) and (b) were affected by the amendments the rest of the section is not set out.

The time of the abandonment is not determinative of jurisdiction, but is determinative of the question whether or not the parents, surviving parent, or guardian of the person, must be a party to the adoption proceeding. *Hicks v. Russell*, 256 N. C. 34, 123 S. E. (2d) 214 (1961).

Where a court of competent jurisdiction has declared a child to be an abandoned child, the court is not ousted of its jurisdiction although it may be found that abandonment occurred less than six months

prior to the institution of the proceeding to determine whether the child had been abandoned. *Hicks v. Russell*, 256 N. C. 34, 123 S. E. (2d) 214 (1961).

Consent of Parent Guilty of Abandonment Need Not Be Obtained.—If it is determined that a child or children have been abandoned, the consent of the parent, or guardian guilty of the abandonment of such child or children need not be obtained. *Hicks v. Russell*, 256 N. C. 34, 123 S. E. (2d) 214 (1961).

And If Child Has Been Abandoned for Six Months Parent Is Not Necessary Party.—If it is found that a child has been abandoned for at least six months immediately preceding the institution of an action or proceeding to declare the child an abandoned child, then such parents, surviving parent, or guardian of the person, declared guilty of the abandonment, shall

not be necessary parties to any proceeding brought under this chapter. *Hicks v. Russell*, 256 N. C. 34, 123 S. E. (2d) 214 (1961).

The act of adoptive parents of child in entering into contract consenting to its adoption by another couple does not constitute constructive abandonment of the child so as to obviate the necessity of their

consent to its adoption by such other couple. Therefore, when such consent is withdrawn within six months, the proceedings for adoption by such other couple should be dismissed upon motion. *In re Adoption of Hoose*, 243 N. C. 589, 91 S. E. (2d) 555 (1956).

Applied in *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

§ 48-6. When consent of father not necessary.—(a) In the case of a child born out of wedlock and when said child has not been legitimated prior to the time of the signing of the consent, the written consent of the mother alone shall be sufficient under this chapter and the father need not be made a party to the proceeding.

(b) In all cases where a court of competent jurisdiction has rendered a judgment of divorce on the grounds of separation between the natural mother of a child and her husband, the consent of the husband shall not be required for the adoption of a child of the wife, begotten during the period of separation determined by the court in the divorce action as the basis of its judgment, and the husband need not be made a party to the adoption proceeding. (1949, c. 300; 1957, c. 778, s. 4.)

Cross Reference. — See note under § 48-7

Editor's Note. — The 1957 amendment added subsection (b).

Father's Consent Unnecessary to Adoption of Illegitimate by Mother and Her

Husband. — Should the mother of an illegitimate child and her husband desire to adopt the child, the father's consent would be unnecessary. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

§ 48-6.1. When consent of mother of illegitimate child not necessary. — Whenever it has been judicially determined in a proceeding instituted pursuant to the provisions of North Carolina G. S. 110-25.1 that a child born out of wedlock is living under such conditions that the health or general welfare of such child is endangered by its living conditions and environment, then, the consent of the mother to the adoption of such child shall not be necessary as a prerequisite to the validity of the adoption of said child. (1963, c. 1258.)

Editor's Note. — The act inserting this section became effective July 1, 1963.

§ 48-7. When consent of parents or guardian necessary.

(b) In any case where the parents or surviving parent or guardian of the person of the child whose adoption is sought are necessary parties and their address is known, or can by due and diligent search be ascertained that fact must be made known to the court by proper allegation in the petition or by affidavit and service of process must be made upon such person as provided by law for service of process on residents of the State or by service of process on nonresidents as provided in G. S. 1-104; provided, however, that service of process upon such person shall not be necessary if he or she has given written consent, duly acknowledged, to the adoption sought in the proceeding.

(1957 c. 778, s. 5.)

Editor's Note. —

The 1957 amendment added the proviso to subsection (b). As only this subsection was changed the rest of the section is not set out.

Parent's consent to adoption must be shown, etc. —

Under this section, except as provided in § 48-5 and § 48-6, before a child can

be adopted, the written consent of the parents, or surviving parent or guardian of the person of the child must be obtained. *In re Adoption of Hoose*, 243 N. C. 589, 91 S. E. (2d) 555 (1956).

In the absence of the consent of the adoptive parents, the court was without jurisdiction to order the adoption of a child unless her adoptive parents had

abandoned such child within the meaning of our statutes. *In re Adoption of Hoose*, 243 N. C. 589, 91 S. E. (2d) 555 (1956).

Where proceeding for the adoption of a child born out of wedlock was instituted in conformity with § 48-6 upon the written consent of its mother but its mother and reputed father married prior to an order of reference directing the superintendent of public welfare of the county to make a full investigation to determine if the child was a proper child for adoption and the natural parents intervened and moved to vacate and dismiss the proceeding, it was held that

at the time of the reference and at the time the court came to determine whether the child was the proper subject for adoption the status of the child had changed from illegitimate to legitimate, and the motion of interveners to vacate the proceeding and for the custody of their child should have been allowed, it being required in a proceeding for the adoption of a legitimate child that its natural parents be parties or their consent to the adoption be made to appear unless they had abandoned the child. *In re Adoption of Doe*, 231 N. C. 1, 56 S. E. (2d) 8 (1949).

§ 48-9. When consent may be given by persons other than parents.

—(a) In the following instances written consent sufficient for the purposes of adoption filed with the petition shall be sufficient to make the person giving consent a party to the proceeding and no service of any process need be made upon such person.

(1) When the parent, parents, or guardian of the person of the child, has in writing surrendered the child to a director of public welfare of a county or to a licensed child placing agency and at the same time in writing has consented generally to adoption of the child, the director of public welfare or the executive head of such agency may give consent to the adoption of the child by the petitioners. A county director of public welfare may accept the surrender of a child who was born in the county or whose parent or parents have established residence in the county.

(2) If the court finds as a fact that there is no person qualified to give consent, or that the child has been abandoned by one or both parents or by the guardian of the person of the child, the court shall appoint some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as next friend of the child to give or withhold such consent. The court may make the appointment immediately upon such determination and forthwith may make such further orders as to the court may seem proper.

(b) The surrender of the child and consent for the child to be adopted given by the parent or guardian of the person to the director of public welfare or to the licensed child placing agency shall be filed with the petition along with the consent of the director of public welfare or of the executive head of the agency to the adoption prayed for in the petition.

(c) Where the child has been surrendered to an agency operating under the laws of another state, and authorized by such state to place children for adoption, the written consent of such agency shall be sufficient for the purposes of this chapter.

(d) If the court finds as a fact that one or both of the parents of a child are unable to give a valid consent to an adoption for the reason that one or both of said parents have been adjudged mentally incompetent, the court may appoint some suitable person or the county director of public welfare of the county in which the child resides to act in the proceeding as the next friend of the child to give or withhold such consent. It shall be the duty of the person so appointed as next friend of the child to make a full investigation as to whether or not the parent or parents of the child is, or are, incurably insane and make a full report thereof to the court. The appointment of any next friend or the county director as herein provided shall be made immediately or at such time fixed by the court upon the making of such determination and the court may make such further orders as may be proper. Upon a finding that one or both of the parents of a child

have been adjudged mentally incompetent, the director of public welfare or licensed agency shall cause notice of such fact to be given to the adopting parents. (1949, c. 300; 1953, c. 906; 1961, c. 186.)

Editor's Note. — The 1953 amendment added subsection (d).

The 1961 amendment substituted "di-

rector" for "superintendent" at several places in the section.

§ 48-11. Consent not revocable.—No consent described in G. S. 48-6, 48-7, or 48-9, shall be revocable by the consenting party after the entering of an interlocutory decree or a final order of adoption when entering of an interlocutory decree has been waived in accordance with the provisions of G. S. 48-21: Provided, no consent shall be revocable after six months from the date of the giving of the consent; provided further, that when the consent has been given generally to a director of public welfare or to a duly licensed child placing agency, it shall not be revocable after thirty days from the date of the giving of the consent. When the consent of any person or agency is required under the provisions of this chapter, the filing of such consent with the petition shall be sufficient to make the consenting person or agency a party of record to the proceeding; and no service of any process need be made upon such person or agency. (1949, c. 300; 1957, c. 778, s. 6; 1961, c. 186.)

Editor's Note. — The 1957 amendment added the words "and no service of any process need be made upon such person or agency" at the end of the section.

The 1961 amendment substituted "director" for "superintendent" in line seven.

Revocation within Six Months.—Ordinarily the consent of parents to the adop-

tion of their child may be withdrawn or revoked within six months from the date it is given. *In re Adoption of Hoose*, 243 N. C. 589, 91 S. E. (2d) 555 (1956).

Instrument held sufficient revocation of consent to adoption. *In re Adoption of Hoose*, 243 N. C. 589, 91 S. E. (2d) 555 (1956).

§ 48-12. Nature of proceeding; venue.

Editor's Note. — For article on interstate and foreign adoptions in North Carolina, see 40 N. C. Law Rev. 691.

Quoted in *In re Custody of Simpson*, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-15. Petition for adoption.

(d) The petition must be signed and verified by the petitioners and must be filed in triplicate. The original of the petition shall be held in the office of the clerk of the superior court, a copy sent to the State Board of Public Welfare, and a copy sent to the director of public welfare or to the licensed child placing agency concerned with the order of reference.

(1961, c. 186.)

Editor's Note. — The 1961 amendment substituted "director" for "superintendent" in line four of subsection (d). As only this subsection was changed by the amendment the rest of the section is not

set out.

Applied in *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

Quoted in *Wilson v. Anderson*, 232 N. C. 212, 59 S. E. (2d) 836 (1950).

§ 48-16. Investigation of conditions and antecedents of child and of suitableness of foster home.—(a) Upon the filing of a petition for adoption the court shall order the county director of public welfare, or a licensed child placing agency through its authorized representative, to investigate the condition and antecedents of the child for the purpose of ascertaining whether he is a proper subject for adoption, to make appropriate inquiry to determine whether the proposed foster home is a suitable one for the child, and to investigate any other circumstances or conditions which may have a bearing on the adoption and of which the court should have knowledge.

(b) The court may order the director of public welfare of one county to make an investigation of the condition and antecedents of the child and the director of

public welfare of another county or counties to make any other part of the necessary investigation.

(c) The county director or directors of public welfare of the authorized representative of such agency described hereinbefore must make a written report within sixty days of his or their findings, on a standard form or following an outline supplied by the State Board of Public Welfare, for examination by the court of adoption. Such report shall be filed with the clerk as a part of the official papers in the adoption proceeding but shall not be retained permanently in the office of the clerk. The clerk shall in nowise be responsible for the permanent custody of the report and said report shall not be open to public inspection except upon order of the court as provided in G. S. 48-26. (1949, c. 300; 1961, c. 186.)

Editor's Note. — The 1961 amendment substituted "director" for "superintendent" at four places in the section, and "directors" for "superintendents" in line one

of subsection (c).

Cited in *In re Adoption of Doe*, 231 N. C. 1, 56 S. E. (2d) 8 (1949).

§ 48-17. Interlocutory decree of adoption.

Jurisdiction of Domestic Relations Court Not Ousted. — The provision in the adoption statute that the court (the clerk), if it be satisfied that the adoption be for the best interests of the child, may tentatively approve the adoption and issue an order giving the care and custody

of the child to the petitioner during the testing period, so to speak, is provisional, and is not intended to oust the jurisdiction of the domestic relations court in a case involving question of custody of such child. In re Blalock, 233 N. C. 493, 64 S. E. (2d) 848, 25 A. L. R. (2d) 818 (1951).

§ 48-19. Report on placement after interlocutory decree. — When the court enters an interlocutory decree of adoption, it must order the county director of public welfare or a licensed child placing agency through its duly authorized representative to supervise the child in its adoptive home and report to the court on the placement on a standard form or following an outline supplied by the State Board of Public Welfare, such report being for examination by the court before entering any final order. (1949, c. 300; 1961, c. 186.)

Editor's Note. — The 1961 amendment substituted "director" for "superintendent" in line three.

§ 48-20. Dismissal of proceeding. — (a) If at any time between the filing of a petition and the issuance of the final order completing the adoption it is made known to the court that circumstances are such that the child should not be given in adoption to the petitioners, the court may dismiss the proceeding.

(b) The court before entering an order to dismiss the proceeding must give notice of not less than five days of the motion to dismiss to the petitioners, to the county director of public welfare or licensed child placing agency having made the investigation provided for in G. S. 48-16, and to the State Board of Public Welfare, and they shall be entitled to a hearing to admit or refute the facts upon which the impending action of the court is based.

(c) Upon dismissal of an adoption proceeding, the custody of the child shall revert to the county director of public welfare or licensed child placing agency having custody immediately before the filing of the petition. If the placement of the child was made by its natural parents directly with the adoptive parents, the director of public welfare of the county in which the petition was filed shall be notified by the court of such dismissal and said director of public welfare shall be responsible for taking appropriate action for the protection of the child. (1949, c. 300; 1961, c. 186.)

Editor's Note. — The 1961 amendment substituted "director" for "superintendent" in subsections (b) and (c).

§ 48-21. Final order of adoption; termination of proceeding within three years.—(a) If no appeal has been taken from any order of the court, the court must complete or dismiss the proceeding by entering a final order within three years of the filing of the petition. A final order of adoption must not be entered earlier than one year from the date of the interlocutory decree except as hereinafter provided. Provided, however, that no adoption proceedings completed prior to April 1, 1959 shall be invalid because of the entry of the final order earlier than one year from the date of the interlocutory decree.

(b) If an appeal is taken from any order of the court, the proceeding must be completed by the court by entering a final order of adoption or a final order dismissing the proceeding within two years from the final judgment upon the appeal.

(c) Upon examination of the written report required under G. S. 48-16, the court may, in its discretion, waive the entering of the interlocutory decree and the probationary period and grant a final order of adoption when the child is by blood a grandchild, great grandchild, nephew or niece, grandnephew or grandniece of one of the petitioners or is the stepchild of the petitioner, or where the child is at least sixteen years of age and has resided in the home of the petitioners for five years prior to the filing of the petition and consents to the adoption as provided in G. S. 48-10.

(d) Upon examination of the written report required under G. S. 48-16, the court may, in its discretion, shorten the probationary period between the granting of the interlocutory decree and the final order of adoption by the length of time the child has resided in the home of the petitioners prior to the granting of the interlocutory decree; provided, that the child was placed in the home of the petitioners by a director of public welfare or by a licensed child placing agency and such fact has been certified to the court by the director of public welfare or the executive head of the child placing agency, but no final order shall be entered until the child shall have resided in the home of the petitioners for a period of one year (1949, c. 300; 1953, c. 571; 1959, cc. 340, 561; 1961, cc. 186, 384.)

Editor's Note. — The 1953 amendment added all of subsection (c) following the comma in line five. The first 1959 amendment inserted the words "great grandchild" in line four of subsection (c), and the second 1959 amendment added the proviso to subsection (a).

The first 1961 amendment substituted "director" for "superintendent" in subsec-

tion (d). And the second 1961 amendment inserted "grandnephew or grandniece" in lines four and five of subsection (c).

A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk. *In re Custody of Simpson*, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-23. Legal effect of final order of adoption.—The following legal effects shall result from the entry of every final order of adoption:

- (1) The final order forthwith shall establish the relationship of parent and child between the petitioners and child, and from the date of the signing of the final order of adoption, the child shall be entitled to inherit real and personal property by, through, and from the adoptive parents in accordance with the statutes relating to intestate succession. An adopted child shall have the same legal status, including all legal rights and obligations of any kind whatsoever, as he would have had if he were born the legitimate child of the adoptive parent or parents at the date of the signing of the final order of adoption, except that the age of the child shall be computed from the date of his actual birth.
- (2) The natural parents of the person adopted, if living, shall, from and after the entry of the final order of adoption, be relieved of all legal duties and obligations due from them to the person adopted, and shall be divested of all rights with respect to such person.
- (3) From and after the entry of the final order of adoption, the words "child," "grandchild," "heir," "issue," "descendant" or an equivalent, or the

plural forms thereof, or any other word of like import in any deed, grant, will or other written instrument shall be held to include any adopted person, unless the contrary plainly appears by the terms thereof, whether such instrument was executed before or after the entry of the final order of adoption and whether such instrument was executed before or after the enactment of this section.

(4) Where an adoption proceeding has been instituted and interlocutory decree has been entered and one of the petitioners who seeks to adopt the child dies before the final order of adoption has been entered, and the wife or husband of such deceased petitioner shall thereafter obtain a final order of adoption, then said child shall have the status defined in subdivisions (1) and (3) of this section and shall be entitled to inherit real and personal property by, through, and from the deceased petitioner in accordance with the statutes relating to intestate succession, and shall be held to be the "child," "grandchild," "heir," "issue," "descendant," or an equivalent of such deceased petitioner or of his or her ancestor, as the case may be, and any such word or word of like import appearing in any deed, grant, will or other written instrument shall be held to include, whenever appropriate, said child unless the contrary plainly appears by the terms thereof. (1949, c. 300; 1953, c. 824; 1955, c. 813, s. 5; 1963, c. 967.)

Editor's Note.—

The 1953 amendment added to this section a proviso relating to the subject-matter now covered by subdivision (4). The 1955 amendment, effective July 1, 1955, rewrote the section. Section 6 of the 1955 amendatory act made it applicable to adoption, whether granted before or after its effective date.

The 1963 amendment again rewrote this section.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 388.

For comment on the 1955 amendment, see 33 N. C. Law Rev. 521.

For article on inheritance right consequent to adoption, see 29 N. C. Law Rev. 227.

As to right of adopted children to take under a will as "grandchildren," see 39 N. C. Law Rev. 203.

Adopted Child Acquires Only Rights Declared by Statute.—The rights which a child acquires by adoption are those and only those declared by legislative act. *Wachovia Bank & Trust Co. v. Andrews*, 264 N.C. 531, 142 S.E.2d 182 (1965).

Section Inapplicable to Existing Deed.—The second sentence of subdivision (1) of this section has no application to a deed executed prior to its enactment. *Allen v. Allen*, 260 N.C. 431, 132 S.E.2d 909 (1963).

Right of Adopted Child to Inherit.—

See *Wilson v. Anderson*, 232 N. C. 212, 59 S.E. (2d) 836 (1950).

The legislature has provided that an adopted child from the date of its adoption shall have the same property rights as a natural born child from the date of its

birth. *Headen v. Jackson*, 255 N. C. 157, 120 S. E. (2d) 598 (1961).

An adopted child shall be entitled to inherit property by, through and from his adoptive parents as if he were born the legitimate child of the adoptive parents. *Greenlee v. Quinn*, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

Any provision of law which prevented an adopted child from sharing in property by descent or distribution in the same manner and to the same extent as a natural born child, was swept away by the repealing clause in Session Laws 1955, c. 813. *Headen v. Jackson*, 255 N. C. 157, 120 S. E. (2d) 598 (1961).

Under the provisions of Session Laws 1955, c. 813, s. 6, an adopted child is entitled to inherit property from the brother or the adopting parent, notwithstanding that the decree of adoption was entered prior to the passage of the statute, the legislature having the power to determine who shall take the property of a person dying subsequent to the effective date of a legislative act. *Bennett v. Cain*, 248 N. C. 428, 103 S. E. (2d) 510 (1958).

Provisions Applicable Only to Intestacy.—

The statutes relating to the right of adopted children to take as distributees and heirs have no bearing upon whether an adopted child takes under a will except in so far as they establish and define the parent and child relationship between the adoptive parents and the adopted child. *Bradford v. Johnson*, 237 N. C. 572, 75 S. E. (2d) 632 (1953).

The courts in most jurisdictions still

make a distinction between devises and inheritances with respect to the right of an adopted child, even though all distinctions between natural born and adopted children have been abolished by statute. Thomas v. Thomas, 258 N. C. 590, 129 S. E. (2d) 239 (1963).

It seems to be the general rule that where no language showing a contrary intent appears in a will, a child adopted either before or after the execution of the will, but prior to the death of the testator, where the testator knew of the adoption in ample time to have changed his will so as to exclude such child if he had so desired, such adopted child will be included in the word "children" when used to designate a class which is to take under the will. Thomas v. Thomas, 258 N. C. 590, 129 S. E. (2d) 239 (1963).

Where a testator devises real property to a son for life and then to the children of said son living at the time of his death, a child adopted by the son after the death of the testator does not take as though he had been a natural born child of the son. Thomas v. Thomas, 258 N. C. 590, 129 S. E. (2d) 239 (1963).

Where a trust provides benefits for named blood relatives of testator with pro-

vision that this number can be increased only in the event great nieces and great nephews were born within 21 years after testator's death, the will clearly indicates testator's intent to exclude children adopted by his nieces and nephews from the benefits, and therefore this section, by its express language, does not apply, and the children adopted by testator's nieces and nephews do not take under the will. Wachovia Bank & Trust Co. v. Andrews, 264 N.C. 531, 142 S.E.2d 182 (1965).

Antilapse Statute Applies to Adopted Child of Legatee. — Where a parent by adoption is named a legatee in the will of her mother, but dies prior to the death of her mother, the adopted child takes the personality bequeathed his mother by adoption under § 31-42.1, even though the adoption was subsequent to the execution of the will, since under the provisions of this section the adopted child has the same standing as though he had been born to his adopted parent at the time of the adoption. Headen v. Jackson, 255 N. C. 157, 120 S. E. (2d) 598 (1961).

Quoted in In re Gibbons, 247 N. C. 273, 101 S. E. (2d) 16 (1957).

Cited in Goodyear v. Goodyear, 257 N. C. 374, 126 S. E. (2d) 113 (1962).

§ 48-25. Record and information not to be made public; violation a misdemeanor.—(a) Neither the original file of the proceeding in the office of the clerk nor the recording of the proceeding by the State Board of Public Welfare shall be open for general public inspection.

(b) With the exception of the information contained in the final order, it shall be a misdemeanor for any person having charge of the file or the record to disclose, except as provided in G. S. 48-26, and as may be required under the provisions of G. S. 48-27, any information concerning the contents of any papers in the proceeding.

(c) No director of public welfare or any employee of a public welfare department nor a duly licensed child placing agency or any of its employees, officers, directors or trustees shall be required to disclose any information, written or verbal, relating to any child or to its natural, legal or adoptive parents, acquired in the contemplation of an adoption of the child, except by order of the clerk of the superior court of original jurisdiction of the adoption, approved by order of a judge of that court, upon motion and after due notice of hearing thereupon given to the director of public welfare or child placing agency; provided, however, that every director of public welfare and child placing agency shall make to the court all reports required under the provisions of G. S. 48-16 and 48-19. (1949, c. 300; 1957, c. 778, s. 7; 1961, c. 186.)

Editor's Note.—The 1957 amendment rewrote subsection (b) and added subsection (c).

The 1961 amendment substituted "director" for "superintendent" in subsection (c).

§ 48-27. Procedure when appeal is taken.—In the event of an appeal from ruling of the clerk in an adoption proceeding, the clerk must impound all papers and reports not open to the public pending final determination of the appeal. Within ten days after final determination of the appeal, the clerk must forward all papers and reports as specified in G. S. 48-24. (1949, c. 300; 1957, c. 778, s. 8.)

Editor's Note.—The 1957 amendment deleted the former provision as to the clerk furnishing copies in the proceeding. A superior court judge has no jurisdiction in adoption proceedings except upon appeal from the clerk. In re Custody of Simpson, 262 N.C. 206, 136 S.E.2d 647 (1964).

§ 48-28. Questioning validity of adoption proceeding.—(a) After the final order of adoption is signed, no party to an adoption proceeding nor anyone claiming under such a party may later question the validity of the adoption proceeding by reason of any defect or irregularity therein, jurisdictional or otherwise, but shall be fully bound thereby, save for such appeal as may be allowed by law. No adoption may be questioned by reason of any procedural or other defect by anyone not injured by such defect, nor may any adoption proceeding be attacked either directly or collaterally by any person other than a natural parent or guardian of the person of the child. The failure on the part of the clerk of the superior court, the county director of public welfare, or the executive head of a licensed child placing agency to perform any of the duties or acts within the time required by the provisions of this section shall not affect the validity of any adoption proceeding.

(b) The final order of adoption shall have the force and effect of, and shall be entitled to, all the presumptions attached to a judgment rendered by a court of general jurisdiction. (1949, c. 300; 1961, c. 186.)

Editor's Note.—The 1961 amendment substituted "director" for "superintendent" in line ten of subsection (a).

Only Parent or Guardian Who Was Not Party to Adoption Proceeding May Attack.—The provision in this section which permits a direct or collateral attack on an adoption proceeding by a natural

parent or guardian of the person of the child, is limited to such natural parent or guardian of the person of the child who was not a party to the adoption proceeding. Hicks v. Russell, 256 N.C. 34, 123 S.E. (2d) 214 (1961).

Quoted in Wilson v. Anderson, 232 N.C. 212, 59 S.E. (2d) 836 (1950).

§ 48-29. Change of name; report to State Registrar; new birth certificate to be made.—(a) For proper cause shown the court may decree that the name of the child shall be changed to such name as may be prayed in the petition. When the name of any child is so changed, the court shall forthwith report such change to the Office of Vital Statistics of the State Board of Health. Upon receipt of the report, the State Registrar of the Office of Vital Statistics shall prepare a new birth certificate for the child named in the report which shall contain the following information: Full adoptive name of child, sex, date of birth, race of adoptive parents, full name of adoptive father, full maiden name of adoptive mother, and such other pertinent information not inconsistent herewith as may be determined by the State Registrar. The city and county of residence of the adoptive parents at the time the petition is filed shall be shown as the place of birth, and the names of the attending physician and the local registrar shall be omitted: Provided, that when the adoptive parents reside in another state at the time the petition is filed the city and county of birth of the child shall be the same on the new birth certificate as on the original certificate. No reference shall be made on the new certificate to the adoption of the child, nor shall the adopting parents be referred to as foster parents.

(b) The State Registrar shall place the original certificate of birth and all papers in his hand pertaining to the adoption under seal which shall not be broken except in the manner provided in G. S. 48-26 for the opening of the record of adoption. Thereafter when a certified copy of the certificate of birth of such person is issued it shall be in the form of a birth registration card containing only the full name, birth date, city and county of birth as shown on the new certificate, race, sex, date of filing, and birth certificate number, except when an order of a court shall direct the issuance of a copy of the original certificate of birth in the manner hereinbefore provided. When one of the adoptive parents of the child, or the child, shall so request, a full copy of the new certificate prepared in accordance with subsection (a) may be issued.

(c) The State Registrar shall not issue to registers of deeds copies of birth certificates for adopted children. Certified copies of such record shall be issued by the State Board of Health only, and such copies shall be prepared in accordance with subsection (b). This section shall not be construed to prohibit issuance of copies of certificates now on file in the office of the register of deeds. (1949, c. 300; 1951, c. 730, ss. 1-4; 1955, c. 951, s. 1.)

Editor's Note. — The 1951 amendment added the proviso to the next to last sentence of subsection (a), substituted in the second sentence of subsection (b) the words "city and county of birth as shown on the new certificate" for the words "state

of birth" and added the last sentence of subsection (b). The amendment also rewrote subsection (c).

The 1955 amendment rewrote subsection (a) of this section.

§ 48-34. Past adoption proceedings validated

Quoted in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. (2d) 836 (1950).

§ 48-35. Prior proceedings not affected.

Quoted in *Wilson v. Anderson*, 232 N.C. 212, 59 S.E. (2d) 836 (1950).

Chapter 49.

Bastardy.

ARTICLE 1.

Support of Illegitimate Children.

§ 49-1. Title.

Cross Reference.—As to special county attorneys and their duties with respect to proceedings authorized by this chapter, see §§ 108-14.01 to 108-14.03.

"parents" in this section and in G.S. 50-13 and the word "parent" in G.S. 49-2 all relate to the rights and duties of parents in respect to their children, and are in pari materia. *Deilinger v. Bollinger*, 242 N.C. 696, 89 S.E. (2d) 592 (1955).

Stated in *State v. Sharpe*, 234 N.C. 154, 66 S.E. (2d) 655 (1951).

Editor's Note.—

For comment on this article, see 28 N.C. Law Rev. 119.

Meaning of Word "Parents."—The word

§ 49-2. Nonsupport of illegitimate child by parents made misdemeanor.—Any parent who willfully neglects or who refuses to support and maintain his or her illegitimate child shall be guilty of a misdemeanor and subject to such penalties as are hereinafter provided. A child within the meaning of this article shall be any person less than eighteen years of age and any person whom either parent might be required under the laws of North Carolina to support and maintain as if such child were the legitimate child of such parent. (1933, c. 228, s. 1; 1937, c. 432, s. 1; 1939, c. 217, ss. 1, 2; 1951, c. 154, s. 1.)

Cross Reference.—As to when offense of failure to support illegitimate child deemed committed in State, see § 14-325.1.

Editor's Note. — The 1951 amendment substituted "eighteen" for "fourteen" in line four.

History of Section.—For a history of this section, see *State v. Robinson*, 245 N.C. 10, 93 S.E. (2d) 126 (1956).

Purpose of Act.—

This article is not primarily to benefit illegitimate children, but to prevent them

from becoming public charges. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

This is a criminal statute. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Continuing Offense.—This section creates a continuing offense. *State v. Robinson*, 236 N.C. 408, 72 S.E. (2d) 857 (1952); *State v. Chambers*, 238 N.C. 373, 78 S.E. (2d) 209 (1953); *State v. Perry*, 241 N.C. 119, 84 S.E. (2d) 329 (1954); *State v. Coppedge*, 244 N.C. 590, 94 S.E. (2d) 569 (1956); *State v. Smith*, 246

N. C. 118, 97 S. E. (2d) 442 (1957); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Meaning of Word "Parents." — The word "parent" in this section and the word "parents" in G. S. 49-1 and 50-13 all relate to the rights and duties of parents in respect to their children, and are in pari materia. Dellinger v. Bollinger, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

This section clearly recognizes that the putative father of an illegitimate child is now deemed to be the father thereof within the eyes of the law. Dellinger v. Bollinger, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

Demand for Support Must Have Been Made before Warrant Was Drawn. — Where, in a prosecution for willful neglect and refusal to support an illegitimate child, the evidence discloses that no demand for support of the child was made upon defendant until after the warrant was drawn, nonsuit must be entered, since the warrant must be supported by the facts as they existed at the time it was formally laid, and cannot be supported by evidence of willful failure thereafter. State v. Perry, 241 N. C. 119, 84 S. E. (2d) 329 (1954).

Section Renders Moral Obligation Legal and Enforceable. — At common law the father of a bastard child is under no legal obligation to support it. However, the father of a bastard is under a natural and moral duty to support his bastard. This section makes this moral obligation of the father legal and enforceable, and our courts should enforce it where the father is subject to their jurisdiction. State v. Tickle, 238 N. C. 206, 77 S. E. (2d) 632 (1953).

The charge must be supported by the facts as they existed at the time it was formerly laid in the court, and cannot be supported by evidence of willful failure supervening between the time the charge was made and time of trial—at least when the trial is had upon the original warrant. State v. Sharpe, 234 N. C. 154, 66 S. E. (2d) 655 (1951); State v. Chambers, 238 N. C. 373, 78 S. E. (2d) 209 (1953).

The begetting of an illegitimate, etc.— See State v. Thompson, 233 N. C. 345, 64 S. E. (2d) 157 (1951); State v. Robinson, 236 N. C. 408, 72 S. E. (2d) 857 (1952); State v. Chambers, 238 N. C. 373, 78 S. E. (2d) 209 (1953).

In accord with 2nd paragraph in original. See State v. Coppedge, 244 N. C. 590, 94 S. E. (2d) 569 (1956); State v. Robinson, 245 N. C. 10, 95 S. E. (2d) 126

(1956); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

The only prosecution contemplated under this section is that grounded on the willful neglect or refusal of a parent to support his or her illegitimate child. State v. Dixon, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

Nor is the failure of the father to pay the expenses of the mother incident to the birth of his illegitimate child a criminal offense. State v. Thompson, 233 N. C. 345, 64 S. E. (2d) 157 (1951); State v. Ferguson, 243 N. C. 766, 92 S. E. (2d) 197 (1956); State v. Coppedge, 244 N. C. 590, 94 S. E. (2d) 569 (1956).

Unborn Child. — A man cannot be held criminally liable for the willful failure to support an unborn illegitimate child. State v. Thompson, 233 N. C. 345, 64 S. E. (2d) 157 (1951); State v. Robinson, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

"To support and maintain his or her illegitimate child," within the purview of this section, is not restricted merely to providing food. It includes the supplying of food, clothing and other necessities, "together with medical assistance reasonably required for the preservation of health" of the child. And this obligation to the child applies even in the case of the newly born baby. State v. Love, 238 N. C. 283, 77 S. E. (2d) 501 (1953).

Liability of Nonresident Who Begot Child in Another State. — Where defendant, a resident of another state, begot a bastard child in such other state, and the mother moved to this State before the child was born, and the mother and child continued to reside in this State from the time of the birth, the offense of willful failure and refusal to support the child was committed in this State, and defendant was constructively in this State when the offense was committed, since he had voluntarily set in motion the chain of circumstances resulting in the commission of the offense here, and therefore the courts of this State had jurisdiction of the offense. State v. Tickle, 238 N. C. 206, 77 S. E. (2d) 632 (1953), commented on in 32 N. C. Law Rev. 435.

The question of paternity is incidental, etc.—

In accord with original. See State v. Thompson, 233 N. C. 345, 64 S. E. (2d) 157 (1951); State v. Robinson, 236 N. C. 408, 72 S. E. (2d) 857 (1952); State v. Chambers, 238 N. C. 373, 78 S. E. (2d) 209 (1953); State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Willfulness Is Essential Element of Offense.—

In accord with original. See *State v. Robinson*, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

Willfulness is an essential element in the crime of failure and refusal to support an illegitimate child. *State v. McDay*, 232 N. C. 388, 61 S. E. (2d) 86 (1950).

"Willful" Defined.—

A defendant's willful failure and refusal to support his illegitimate child means an intentional neglect or refusal. *State v. McDay*, 232 N. C. 388, 61 S. E. (2d) 86 (1950).

In prosecution under this section an instruction defining willfully as "wrongfully and unjustifiably, without valid and good excuse" instead of an intentional neglect or refusal, must be held for reversible error. *State v. McDay*, 232 N. C. 388, 61 S. E. (2d) 86 (1950).

Willfulness Must Be Charged in Warrant, etc.—

In accord with 1st paragraph in original. See *State v. Moore*, 238 N. C. 743, 78 S. E. (2d) 914 (1953).

In accord with 2nd paragraph in original. See *State v. Coppedge*, 244 N. C. 590, 94 S. E. (2d) 569 (1956); *State v. Smith*, 246 N. C. 118, 97 S. E. (2d) 442 (1957).

Proof of Willfulness Required.—

In accord with original. See *State v. Moore*, 238 N. C. 743, 78 S. E. (2d) 914 (1953).

State Must Prove Paternity, etc.—

In accord with 2nd paragraph in original. See *State v. Thompson*, 233 N. C. 345, 64 S. E. (2d) 157 (1951); *State v. Sharpe*, 234 N. C. 154, 66 S. E. (2d) 655 (1951); *State v. Chambers*, 238 N. C. 373, 78 S. E. (2d) 209 (1953); *State v. Dixon*, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

To impose responsibility on one for the support of an illegitimate child, it must first be established that he is the father of the child. The Act of 1741 created a conclusive presumption from the oath of the mother. This was modified in 1814 to make a *prima facie* case by the affidavit or oath of the woman. There is now no presumption from the affidavit or testimony of the mother. *State v. Robinson*, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

It is as much the duty of the State to establish willful failure to support by evidence showing that fact beyond reasonable doubt as it is to so establish paternity. *State v. Dixon*, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

And That Willful Neglect Followed Demand for Support.—In order to support a

finding of willful nonsupport of an illegitimate child by the father, the State must prove beyond a reasonable doubt that the mother of the child or, under certain circumstances, the director of public welfare has, after the child was born and before the prosecution was commenced, made demand upon the father for support, and after such demand and before prosecution, the father willfully neglected and refused to provide adequate support according to his means and condition and the necessities of the child. *State v. Ellis*, 262 N. C. 446, 137 S.E.2d 840 (1964).

But Paternity Need Not Be Relitigated on Subsequent Prosecution.—Upon a prosecution for a subsequent willful neglect or refusal to support, the accused is not entitled to have the question of paternity relitigated. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964), denying new trial on issue of paternity.

Failure to Charge as to Necessity of Notice and Demand for Support. —The failure of the court to charge that there was no obligation upon defendant to support the child in question until he had been given notice that he was the father and demand made upon him for support, cannot be held prejudicial when there is evidence of notice and demand prior to the issuance of the warrant and the court categorically charges that the jury must be satisfied beyond reasonable doubt that defendant was the father of the child, and further that he knowingly, intentionally and with stubborn and willful purpose refused to support the child before they could return a verdict of guilty. *State v. Humphrey*, 236 N. C. 608, 73 S. E. (2d) 479 (1952).

Cross-Examination as to Failure to Make Blood Test.—It was held competent upon the trial of a prosecution under this section for the solicitor to ask defendant upon cross-examination if the reason the blood test was not made was because defendant knew the baby was his, the matter being within the bounds of a fair cross-examination. The legal principles relating to the purpose and value of a blood test are not relevant upon objection to the cross-examination. *State v. Chambers*, 238 N. C. 373, 78 S. E. (2d) 209 (1953).

Testimony of Prosecutrix That She Wrote Defendant Demanding Support for Child.—In a prosecution under this section, testimony of prosecutrix that she wrote defendant after the baby was born demanding support for it is sufficient upon that question without the introduction of the letter in evidence, since the testimony

is sufficient to support the inference that the letter was written before the bill of indictment was laid. *State v. Chambers*, 233 N. C. 373, 78 S. E. (2d) 209 (1953).

Submission of Issues Is Virtually Necessary.—The submission of issues in prosecutions under this section is, as a practical matter, almost a necessity. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Because of the nature and effect of the elements involved in this section, it would be difficult to properly try a case pursuant to this statute without submitting to the jury either oral interrogatories or written issues. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Unless Paternity Has Been Previously Determined.—If the question of paternity has been previously determined adversely to the accused, the case could well be tried solely upon the general issue of guilt. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

And Verdict upon Proper Issues Is Sufficient without General Verdict of Guilty.—A verdict upon the issues of paternity and nonsupport if resolved in favor of the State, is sufficient to support a judgment against defendant without a general verdict by the jury of guilty. This does not contravene the provisions of N.C. Const., Art. I, §§ 11 and 13, requiring trial and verdict by jury in criminal cases. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964), holding findings in special verdict deficient and granting new trial.

Verdict Must Find, etc.—

If a jury find that the accused is parent of the child but has not willfully failed or refused to support the child, there can be no conviction, for no crime has been committed. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

Evidence Held Sufficient.—

In a prosecution under this section the

§ 49-3. Place of birth of child no consideration.

Applied in *State v. Tickle*, 238 N. C. 206, 77 S. E. (2d) 632 (1953).

§ 49-4. When prosecution may be commenced.—The prosecution of the reputed father of an illegitimate child may be instituted under this chapter within any of the following periods, and not thereafter:

1. Three years next after the birth of the child; or
2. Where the paternity of the child has been judicially determined within three years next after its birth, at any time before the child attains the age of eighteen years; or
3. Where the reputed father has acknowledged paternity of the child by payments for the support thereof within three years next after the birth of such child, three years from the date of the last payment whether such last payment was made

evidence was held sufficient to carry the case to the jury. *State v. Humphrey*, 236 N. C. 608, 73 S. E. (2d) 479 (1952).

Evidence held sufficient to show failure to support at time warrant issued. *State v. Sharpe*, 234 N. C. 154, 66 S. E. (2d) 655 (1951).

Verdict Held Insufficient.—

A verdict of "guilty of the charge of bastardy" will not support a judgment in a prosecution under this section. *State v. Dixon*, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

Where the nonsupport issue submitted was, "Has the defendant . . . willfully neglected and refused to support and maintain said illegitimate child," an affirmative answer did not supply the information as to whether demand was made, or, if made, whether it was before or after the prosecution was commenced. Because of the deficiency of the findings in the special verdict there had to be a new trial. *State v. Ellis*, 262 N.C. 446, 137 S.E.2d 840 (1964).

A judgment as of nonsuit in a prosecution under this section does not constitute an adjudication on the issue of paternity and will not support a plea of former acquittal in a subsequent prosecution under the statute, the offense being a continuing one. *State v. Robinson*, 236 N. C. 408, 72 S. E. (2d) 857 (1952). See also, *State v. Perry*, 241 N. C. 119, 84 S. E. (2d) 329 (1954); *State v. Ferguson*, 243 N. C. 766, 92 S. E. (2d) 197 (1956).

Applied in *State v. Wortham*, 240 N. C. 132, 81 S. E. (2d) 254 (1954); *State v. Robinson*, 248 N. C. 282, 103 S. E. (2d) 376 (1958); *State v. Little*, 263 N.C. 130, 139 S.E.2d 8 (1964).

Cited in *State v. Stone*, 231 N. C. 324, 56 S. E. (2d) 675 (1949); *State v. Aldridge*, 254 N. C. 297, 118 S. E. (2d) 766 (1961).

within three years of the birth of such child or thereafter: Provided, the action is instituted before the child attains the age of eighteen years.

The prosecution of the mother of an illegitimate child may be instituted under this chapter at any time before the child attains the age of eighteen years. (1933, c. 228, s. 3; 1939, c. 217, s. 3; 1945, c. 1053; 1951, c. 154, s. 2.)

Editor's Note. — The 1951 amendment substituted "eighteen years" for "fourteen years" at three places in the section.

The failure to support an illegitimate child is a continuing offense, and the date such child was born is immaterial provided the action is instituted within the time prescribed by this section, and that demand for the support of such child was made a reasonable time before the action was in-

stituted. *State v. Womack*, 251 N. C. 342, 111 S. E. (2d) 332 (1959).

Where the question of paternity is judicially determined within three years after the birth of the illegitimate child, the defendant may thereafter be prosecuted for his willful neglect and refusal to support the child. *State v. Robinson*, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

§ 49-5. Prosecution; indictments; death of mother no bar; determination of fatherhood.—Proceedings under this article may be brought by the mother or her personal representative, or, if the child is likely to become a public charge, the director of public welfare or such person as by law performs the duties of such official in said county where the mother resides or the child is found. Indictments under this article may be returned in the county where the mother resides or is found, or in the county where putative father resides or is found, or in the county where the child is found. The fact that the child was born outside of the State of North Carolina shall not be a bar to indictment of the putative father in any county where he resides or is found, or in the county where the mother resides or the child is found. The death of the mother shall in nowise affect any proceedings under this article. Preliminary proceedings under this article to determine the paternity of the child may be instituted prior to the birth of the child but when the judge or court trying the issue of paternity deems it proper, he may continue the case until the woman is delivered of the child. When a continuance is granted, the courts shall recognize the person accused of being the father of the child with surety for his appearance, either at the next term of the court or at a time to be fixed by the judge or court granting a continuance, which shall be after the delivery of the child. (1933, c. 228, s. 4; 1961, c. 186.)

Editor's Note.—

The 1961 amendment substituted "director" for "superintendent" in line three.

Institution of Proceedings.—The provision that proceedings under this section can only be instituted by mother or her personal representative or the superintendent of public welfare is applicable both to preliminary proceedings to determine paternity and to proceedings involving completed crime. *State v. Robinson*, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

The affidavit initiating the prosecution may be made by the mother or the director of public welfare. *State v. Dixon*, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

The mother may decide whether to call

upon the father for assistance. In the event she elects not to make the demand, her election will be respected unless the child is likely to become a public charge, then the director of public welfare may proceed. *State v. Dixon*, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

Continuance.—By express statutory language preliminary proceedings to determine the paternity of the child may be initiated and determined before the birth of the child. A continuance of the proceeding until after the birth of the child rests in the sound discretion of the trial court. *State v. Robinson*, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

§ 49-7. Jurisdiction of inferior courts; issues and orders.

Justice of Peace Has No Jurisdiction.—A prosecution of a defendant for willful failure to support his illegitimate child may

not be instituted and heard in a court of a justice of the peace. *State v. Dixon*, 257 N. C. 653, 127 S. E. (2d) 246 (1962).

This section seems to contemplate the submission of issues. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Issue of Paternity Must Be Determined First.—In a prosecution of a father for willful neglect or refusal to support his illegitimate child the issue of paternity must first be determined before and separate from the determination of the issue of guilt or innocence of the offense charged. State v. Robinson, 236 N. C. 408, 72 S. E. (2d) 857 (1952).

The court is expressly commanded by this section to first determine the paternity of the child. State v. Robinson, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

The domestic relations court was entitled to determine paternity of child, though when the affidavit was filed and the warrant was issued the defendant had not committed the offense of willfully neglecting his illegitimate child, and even though the court exceeded its power in ordering the defendant to make payments, its determination of the facts as to pa-

ternity was in effect a jury verdict, and constituted a judicial declaration of the paternity of the child. State v. Robinson, 245 N. C. 10, 95 S. E. (2d) 126 (1956).

And Established beyond a Reasonable Doubt.—The paternity of the child cannot be established by mere preponderance of the evidence but must be established beyond a reasonable doubt. State v. Robinson, 245 N. C. 10, 95 S. E. (2d) 126 (1956)

Appeal on Issue of Parentage Where Defendant Acquitted on Charge of Non-support.—

Under the provisions of this section a defendant in a prosecution for nonsupport of his illegitimate child may appeal from a verdict establishing his paternity of the child notwithstanding that the verdict finds him not guilty of nonsupport. State v. Clement, 230 N. C. 614, 54 S. E. (2d) 919 (1949).

Cited in State v. Robinson, 248 N. C. 282, 103 S. E. (2d) 376 (1958).

§ 49-8. Power of court to modify orders; suspend sentence, etc.

Six months is the maximum sentence permitted by this section. State v. Ellis, 262 N.C. 446, 137 S.E.2d 840 (1964).

Suspension or Execution of Sentence.—Upon defendant's conviction of willful failure to support his illegitimate child the trial court has plenary power to suspend execution of sentence on condition that defendant pay specified sums of money into court for support of his child. State

v. Bowser, 232 N. C. 414, 61 S. E. (2d) 98 (1950).

A domestic relations court has authority, upon conviction of a defendant for willful refusal to support her illegitimate child, to suspend sentence upon condition that defendant pay a stipulated sum per week into court for the support of the child. State v. Robinson, 248 N. C. 282, 103 S. E. (2d) 376 (1958).

ARTICLE 2.

Legitimation of Illegitimate Children.

§ 49-11. Effects of legitimation.—The effect of legitimation under G.S. 49-10 shall be to impose upon the father and mother all of the lawful parental privileges and rights, as well as all of the obligations which parents owe to their lawful issue, and to the same extent as if said child had been born in wedlock, and to entitle such child by succession, inheritance or distribution, to take real and personal property by, through, and from his or her father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock. (Code, s. 40; Rev., s. 264; C. S., s. 278; 1955, c. 540, s. 2; 1959, c. 879, s. 10; 1963, c. 1131.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote the first sentence.

The 1963 amendment, effective July 1, 1960, rewrote the second sentence, inserting reference to the Intestate Succession Act in place of the statute of descents and distribution.

The 1963 amendment rewrote the first sentence so as to give parents of a child legitimated under the law all legal privileges and parental rights as if such child had been born in lawful wedlock.

Child May Inherit by, through and from Parents.—A legitimated child shall have the same right to inherit by, through, and

from his father and mother as if such child had been born in lawful wedlock. Greenlee

v. Quinn, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

§ 49-12. Legitimation by subsequent marriage.—When the mother of any child born out of wedlock and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. In case of death and intestacy, the real and personal estate of such child shall descend and be distributed according to the Intestate Succession Act as if he had been born in lawful wedlock. (1917, c. 219, s. 1; C. S., s. 279; 1947, c. 663, s. 2; 1955, c. 540, s. 3; 1959, c. 879, s. 11.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

The 1959 amendment, effective July 1, 1960, rewrote the second sentence, inserting reference to the Intestate Succession Act in place of the statute of descents and distribution.

Section Retroactive.—

By its express language, this section is retroactive as well as prospective. Greenlee v. Quinn, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

Child Has Same Right to Inherit as if Born in Lawful Wedlock.—A legitimated child shall have the same right to inherit by, through, and from his father and mother as if such child had been born in lawful wedlock. Greenlee v. Quinn, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

Including Right to Inherit from Collateral.—The legislature intended to confer upon the legitimated child the same right to inherit from collateral relations as it would have had if it had been born in lawful wedlock. Greenlee v. Quinn, 255 N. C. 601, 122 S. E. (2d) 409 (1961).

The legislature has given a new or additional meaning to the word "legitimate" as used in this section. Although this meaning is not strictly within its ordinary definition, the courts will adopt the meaning impressed upon the word by legislative enactment. Carter v. Carter, 232 N. C. 614, 61 S. E. (2d) 711 (1950).

§ 49-13. New birth certificate on legitimization.—A certified copy of the order of legitimization when issued under the provisions of G. S. 49-10 shall be sent by the clerk of the superior court under his official seal to the State Registrar of Vital Statistics who shall then make the new birth certificate bearing the full name of the father, and change the surname of the child so that it will be the same as the surname of the father.

When a child is legitimated under the provisions of G. S. 49-12, the State Registrar of Vital Statistics shall make a new birth certificate bearing the full name of the father upon presentation of a certified copy of the certificate of marriage of the father and mother and change the surname of the child so that it will be the same as the surname of the father. (1947, c. 663, s. 3; 1955, c. 951, s. 2.)

This section and § 50-13 must be construed in pari materia, and therefore where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate just as if it had been born in lawful wedlock, and such child is a minor child of the marriage within the purview of § 50-13, and the father may be required to furnish support for such child upon motion made either before or after decree of divorce. Carter v. Carter, 232 N. C. 614, 61 S. E. (2d) 711 (1950).

"Reputed Father."—

The use of the word "reputed" rather than "putative" in this section was intended merely to dispense with the absolute proof of paternity, so that, if the child is "regarded," "deemed," "considered," or "held in thought" by the parents themselves as their child, either before or after marriage, it is legitimate. Carter v. Carter, 232 N. C. 614, 61 S. E. (2d) 711 (1950).

Rights and Duties as to Custody and Support.—In declaring in this section that "the child shall in all respects after such intermarriage be deemed and held to be legitimate," the General Assembly clearly intended that the child should be treated as a child born in lawful wedlock in determining the rights and duties of parent and child as to custody and support. In re Adoption of Doe, 231 N. C. 1, 56 S. E. (2d) 8 (1949).

Editor's Note.—The 1955 amendment added "and change the surname of the child so that it will be the same as the

surname of the father" at the end of the first and second paragraphs and made other changes of a minor nature.

Chapter 50.

Divorce and Alimony.

Sec.

- 50-6. Divorce after separation of one year on application of either party.
- 50-8. Contents of complaint; verification.
- 50-10. Material facts found by jury; parties cannot testify to adultery; waiver of jury trial in certain actions.
- 50-11.1. Children born of voidable marriage legitimate.

Sec.

- 50-12. Resumption of maiden name or adoption of name of prior deceased husband.
- 50-16. Alimony without divorce; custody of children.
- 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.

§ 50-1. Jurisdiction.**Editor's Note.**—

For case law survey on domestic relations, see 41 N. C. Law Rev. 456. For note on early statutory and common law of

divorce in North Carolina, see 41 N. C. Law Rev. 604.

Applied in Pulley v. Pulley, 255 N. C. 423, 121 S. E. (2d) 876 (1961).

§ 50-3. Venue.**Section Not Jurisdictional—Waiver.**—

In accord with original. See Denson v. Denson, 255 N. C. 703, 122 S. E. (2d) 507 (1961).

The provisions of this section, that in divorce proceedings the summons shall be returnable to the court of the county in which either the plaintiff or defendant resides, are not jurisdictional; they relate only to venue. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

The provisions of this section are not jurisdictional, but relate to venue and may be waived. Nelms v. Nelms, 250 N. C. 237, 108 S. E. (2d) 529 (1959).

Any Superior Court Has Jurisdiction If Either Party Is Domiciled in State.—In the absence of fraud the superior court of any county in the State has jurisdiction for divorce if either of the parties is domiciled in this State. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

But If Plaintiff Conceals Action and Whereabouts of Defendant, Jurisdiction Is Lacking.—If a plaintiff should fraudulently conceal his action for a divorce from the defendant and the whereabouts of the defendant from the court, jurisdiction would be lacking and a divorce obtained upon service of summons by publication would be a nullity. Stokes v. Stokes, 260 N.C. 203, 132 S.E.2d 315 (1963).

Any action brought in the wrong county may be removed instead of dismissing it, and a failure to make the motion for removal is a waiver of the objection to the county in which it is brought. Denson v. Denson, 255 N. C. 703, 122 S. E. (2d) 507 (1961).

Stated in Batts v. United States, 120 F. Supp. 26 (1954).

§ 50-4. What marriages may be declared void on application of either party.

Marriage of Person Incapable of Contracting for Want of Understanding.—Under the rule of the common law as modified by statute, the marriage of a person incapable of contracting for want of understanding is not void *ipso facto*; but, if and when declared void in a legally constituted action, such marriage is void ab

initio. Ivery v. Ivery, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

An action to declare void a marriage of a person incapable of contracting for want of understanding may be instituted in the lifetime of the parties thereto by a guardian for the alleged mentally incompetent or by such mentally incompetent if and when he

(she) becomes mentally competent to do so; and unless such marriage is followed by cohabitation and the birth of issue, such action may be instituted after the death of such mentally incompetent by a person or persons whose legal rights depend upon whether such marriage is valid or void. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

A marriage of a person incapable of contracting for want of understanding, when followed by cohabitation and the birth of issue, may not be declared void after the death of either of the parties. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

§ 50-5. Grounds for absolute divorce.

4. If there has been a separation of husband and wife, whether voluntary or involuntary, provided such involuntary separation is in consequence of a criminal act committed by the defendant prior to such divorce proceeding, and they have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in this State for six months.

6. In all cases where a husband and wife have lived separate and apart for five consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the same spouse: Provided, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered. Provided further, that proof of incurable insanity be supported by the testimony of two reputable physicians, one of whom shall be a staff member or the superintendent of the institution wherein the insane spouse is confined, and one regularly practicing physician in the community wherein such husband and wife reside, who has no connection with the institution in which said insane spouse is confined; and provided further that a sworn statement signed by said staff member or said superintendent of the institution wherem the insane spouse is confined shall be admissible as evidence of the facts and opinions therein stated as to the mental status of said insane spouse and as to whether or not said insane spouse is suffering from incurable insanity, or the parties according to the laws governing depositions may take the deposition of said staff member or superintendent of the institution wherein the insane spouse is confined.

In lieu of proof of incurable insanity and confinement for five consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered prescribed in the preceding paragraph, it shall be sufficient if the evidence shall show that the allegedly insane spouse was adjudicated to be insane more than five (5) years preceding the institution of the action for divorce, that such insanity has continued without interruption since such adjudication and that such person has not been adjudicated to be sane since such adjudication of insanity; provided, further, proof of incurable insanity existing after the institution of the action for divorce shall be furnished by the testimony of two reputable, regularly practicing physicians, one of whom shall be a psychiatrist.

In all decrees granted under this subsection in actions in which the husband is the plaintiff the court shall require him to provide for the care and maintenance of the insane defendant as long as she may live, compatible with his financial standing and ability, and the trial court will retain jurisdiction of the parties and the

Incestuous Marriage.—In *Baity v. Cranfill*, 91 N. C. 293 (1884), it was held that the authority conferred upon the court by this section was so limited by the second proviso of § 51-3 as to deprive the court of the power to declare void the marriage of uncle and niece, "nearer of kin than first cousins." after the husband's death, when their marriage was followed by cohabitation and the birth of issue. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).
Applied in *Dees v. McKenna*, 261 N.C. 373, 134 S.E.2d 644 (1964).

cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring the plaintiff to furnish the necessary funds for such care and maintenance. In the event of feme defendant's continued confinement in an institution for the mentally disordered, it shall be deemed sufficient support and maintenance if the plaintiff continue to pay and discharge the monthly payments required of him by the institution, such payments to be in amounts equal to those required of patients similarly situated. In all such actions wherein the wife is the plaintiff and the insane defendant has insufficient income and property to provide for his care and maintenance, then in the discretion of the court, the court may require her to provide for the care and maintenance of the insane defendant as long as he may live, compatible with her financial standing and ability, and the trial court will retain jurisdiction of the parties and the cause, from term to term, for the purpose of making such orders as equity may require to enforce the provisions of the decree requiring plaintiff to furnish the necessary funds for such care and maintenance.

Service of process shall be held upon the regular guardian for said defendant spouse, if any, and if no regular guardian, upon a duly appointed guardian ad litem and also upon the superintendent or physician in charge of the institution wherein the insane spouse is confined. Such guardian or guardian ad litem shall make an investigation of the circumstances and notify the next of kin of the insane spouse or the superintendent of the institution of the action and whenever practical confer with said next of kin before filing appropriate pleadings in behalf of the defendant.

In all actions brought under this subsection, if the jury finds as a fact that the plaintiff has been guilty of such conduct as has conduced to the unsoundness of mind of the insane defendant, the relief prayed for shall be denied.

The plaintiff or defendant must have resided in this State for six months next preceding institution of any action under this section.

(1953, c. 1087; 1955, c. 887, s. 15; 1963, c. 1173; 1965, c. 636, s. 1.)

Cross Reference.—

As to necessary allegations, see § 50-8 and note thereto.

Editor's Note.—

The 1953 amendment inserted "five" in lieu of "ten" in lines one and six of subsection 6. The 1955 amendment added the last proviso to the first paragraph of subsection 6.

The 1963 amendment inserted the present second paragraph of subsection 6.

The 1965 amendment substituted "one year" for "two successive years" in subsection 4.

As the rest of the section was not affected by the amendments, it is not set out.

For note on domicile of military personnel for purpose of divorce, see 31 N. C. Law Rev. 304. For note discussing cases decided under this section, see 40 N. C. Law Rev. 808.

The purpose of subsection 6, as amended, is to require that a person alleged to be incurably insane shall not have his or her marital status altered until such person has been committed to an institution for the care and treatment of the mentally disordered for a period of five successive years in order that it may be

ascertained whether or not the inmate's insanity is incurable. Mere confinement for a period of five successive years in such an institution would fulfill the literal meaning of the statute but it would not be in compliance with its spirit or purpose. *Mabry v. Mabry*, 243 N. C. 126, 90 S. E. (2d) 221 (1955).

The remedy provided in subsection 6 is exclusive. *Lawson v. Bennett*, 240 N. C. 52, 81 S. E. (2d) 162 (1954).

Release on Probation.—In a proceeding by wife for a divorce on the ground of husband's insanity where doctors testified that the husband was incurably insane, the fact that the husband during the five year period of confinement had been released on probation to his relatives on separate occasions, once for ten days and once for six months, did not bar divorce of wife on the ground of insanity, since release on probation did not constitute such acts on the part of the hospital authorities as to terminate the period of confinement within the meaning of subsection 6. *Mabry v. Mabry*, 243 N. C. 126, 90 S. E. (2d) 221 (1955).

By the use of the word "confined" in the statute, the legislature did not con-

template such confinement as would require an inmate to be at all times under lock and key. *Mabry v. Mabry*, 243 N. C. 126, 90 S. E. (2d) 221 (1955).

Separation Occasioned by Insanity Other Than Incurable. — Separation occasioned by insanity is cause for divorce in North Carolina only in cases of incurable insanity. And in these cases the requirements of this section must be met. In all other instances of separation arising by reason of mental incompetency, such separation is not a ground for divorce. But to bar an action for divorce based on two years' separation under § 50-6, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act. *Moody v. Moody*, 253 N. C. 752, 117 S. E. (2d) 724 (1961).

§ 50-6. Divorce after separation of one year on application of either party. — Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce. (1931, c. 72; 1933, c. 163; 1937, c. 100, ss. 1, 2; 1943, c. 448, s. 3; 1949, c. 264, s. 3; 1965, c. 636, s. 2.)

Cross References. —

As to effect of husband's suit under this section on wife's action for alimony without divorce under § 55-16, see annotation under § 50-16.

Editor's Note. —

The 1965 amendment substituted "one year" for "two years" in the first sentence.

For note discussing cases decided under this section, see 40 N. C. Law Rev. 808.

This section creates an independent cause of divorce. *Pickens v. Pickens*, 258 N. C. 84, 127 S. E. (2d) 889 (1962).

Jurisdictional Requirements. — Under this section in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years (now one year); and (2) the plaintiff, husband or wife, shall have resided in this State for a period of one year (now six months). These two requirements are jurisdictional and if either one or the other of these elements does not exist the court would not have jurisdiction to try the action and any decree rendered would be void. *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

Under this section, in order to maintain an action for divorce, the husband and wife shall have (1) lived separate and apart for two years (now one year); and (2) the

Proof of Separation. — In a suit for divorce on the statutory ground of insanity, the insanity must be the reason for the separation of the parties, but no greater proof of separation and its continuance during the five year period is required than in a proceeding for divorce based on two year separation period in § 50-5 (4). *Mabry v. Mabry*, 243 N. C. 126, 90 S. E. (2d) 221 (1955).

Applied in *Becker v. Becker*, 262 N.C. 685, 138 S.E.2d 507 (1964).

Cited in *Carpenter v. Carpenter*, 244 N. C. 286, 93 S. E. (2d) 617 (1956); as to subsection 1, in *Cunningham v. Cunningham*, 234 N. C. 1, 65 S. E. (2d) 375 (1951); as to subsection 4, in *Mallard v. Mallard*, 234 N. C. 654, 68 S. E. (2d) 247 (1951).

plaintiff, husband or wife, shall have resided in the State of North Carolina for a period of six months. *Denson v. Denson*, 255 N.C. 703, 122 S. E. (2d) 507 (1961).

The jurisdictional requirement as to residence under this section is met by allegation and proof of residence within the State of North Carolina for a period of six months next preceding the commencement of the action. *Denson v. Denson*, 255 N. C. 703, 122 S. E. (2d) 507 (1961).

Physical Separation Must Be Accompanied by Intention to Cease Cohabitation. — A husband and wife live separate and apart for the prescribed period within the meaning of this section when, and only when, these two conditions concur: (1) They live separate and apart physically for an uninterrupted period of two years (now one year); and (2) their physical separation is accompanied by at least an intention on the part of one of them to cease their matrimonial cohabitation. *Mallard v. Mallard*, 234 N.C. 654, 68 S. E. (2d) 247 (1951); *Richardson v. Richardson*, 257 N. C. 705, 127 S. E. (2d) 525 (1962).

"Judicial Separation" Included. —

The effect of a divorce a mensa is to legalize the separation. *Pruett v. Prueett*, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

The effect of a judgment granting a

divorce a mensa et thoro is to legalize the separation of the parties which theretofore had been caused by the husband's actions, and after two years (now one year) from the date of such judgment, the husband can proceed to an absolute divorce. Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964).

The effect of a divorce a mensa et thoro, obtained by the wife on the ground her husband abandoned her, is to legalize their separation from the date of such judgment; and in such case the husband, after two years (now one year) from the date of such judgment, may proceed to an absolute divorce. Richardson v. Richardson, 257 N.C. 705, 127 S.E. (2d) 525 (1962).

A judgment in an action instituted under § 50-16 decreeing that the husband has willfully abandoned the wife and awarding her support and maintenance constitutes a judicial separation which, two years (now one year) thereafter, will permit the husband to obtain an absolute divorce. Rouse v. Rouse, 258 N.C. 520, 128 S.E. (2d) 865 (1963); Wilson v. Wilson, 260 N.C. 347, 132 S.E.2d 695 (1963).

Section Inapplicable Where Separation Is Due to Insanity of Defendant.—Divorce on the grounds of two years' (now one year's) separation under this section cannot be maintained when the separation is due to the insanity or mental incapacity of defendant spouse, the sole remedy in such instance being under subsection 6 of § 50-5. Lawson v. Bennett, 240 N.C. 52, 81 S.E. (2d) 162 (1954); Moody v. Moody, 253 N.C. 752, 117 S.E. (2d) 724 (1961).

But to bar an action for divorce based on two years' (now one year's) separation, the mental impairment must be to such an extent that defendant does not understand what he or she is engaged in doing and the nature and consequences of the act. Moody v. Moody, 253 N.C. 752, 117 S.E. (2d) 724 (1961).

Spouse May Not Obtain Divorce Solely on Own Dereliction.—

In accord with 1st paragraph in original. See Pruett v. Pruett, 247 N.C. 13, 100 S.E. (2d) 296 (1957).

Plaintiff Need Not Establish That He Is Injured Party.—Where the husband sues the wife for an absolute divorce upon the ground of two years' (now one year's) separation under this section, he is not required to establish as a constituent element of his cause of action that he is the injured party. Pickens v. Pickens, 258 N.C. 84, 127 S.E. (2d) 889 (1962).

Willful Abandonment Is Only Defense Recognized by Decisions.—If the husband

alleges and establishes that he and his wife have lived separate and apart continuously for two years (now one year) or more next preceding the commencement of the action within the meaning of this section, the only defense recognized by the decisions is that the separation was caused by the act of the husband in willfully abandoning her. Pickens v. Pickens, 258 N.C. 84, 127 S.E. (2d) 889 (1962).

Willful Abandonment by Plaintiff as Defense.—Where the husband sues the wife for an absolute divorce upon the ground of two years' (now one year's) separation under this section, he is not required to establish as a constituent element of his cause of action that he is the injured party. Nevertheless, the law will not permit him to take advantage of his own wrong. Consequently, the wife may defeat the husband's action for an absolute divorce under this section by showing as an affirmative defense that the separation of the parties has been occasioned by the act of the husband in willfully abandoning her. Cameron v. Cameron, 235 N.C. 82, 68 S.E. (2d) 796 (1952); Johnson v. Johnson, 237 N.C. 383, 75 S.E. (2d) 109 (1953).

Where the husband sues the wife under this section for an absolute divorce on the ground of two years' (now one year's) separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's willful abandonment of his wife. Richardson v. Richardson, 257 N.C. 705, 127 S.E. (2d) 525 (1962).

For note on abandonment as a defense to divorce on the ground of separation, see 36 N.C. Law Rev. 495.

Prior Action by Wife under Section 50-7(1) Abates Action by Husband under This Section.—See annotations under § 50-7(1).

Burden of Establishing Wrongful Conduct and Willful Abandonment.—The plaintiff having based his ground for divorce upon two years' (now one year's) separation, and defendant having averred by way of defense and bar to the action that whatever estrangement between the parties was occasioned by the plaintiff's own wrongful conduct and willful abandonment, the burden rests upon the defendant to establish the defense or defenses set up in the answer and relied upon by defendant. McLean v. McLean, 237 N.C. 122, 74 S.E. (2d) 320 (1953).

Where the husband sues the wife under this section for an absolute divorce on the

ground of two years' (now one year's) separation, the wife may defeat the husband's action by alleging and establishing as an affirmative defense that the separation was caused by the husband's willful abandonment of his wife, and in such case, the burden of proof is on the defendant (wife) to establish her affirmative defense. *Taylor v. Taylor*, 257 N. C. 130, 125 S. E. (2d) 373 (1962).

Where the wife alleges as an affirmative defense to the husband's action that the separation was caused by the husband's willful abandonment of the wife, the burden of proof is on the wife to establish her alleged affirmative defense. *Richardson v. Richardson*, 257 N. C. 705, 127 S. E. (2d) 525 (1962).

To defeat the husband's case, the wife must allege and establish willful abandonment as an affirmative defense. *Pickens v. Pickens*, 258 N. C. 84, 127 S. E. (2d) 889 (1962).

Plaintiff's admitted conviction in a criminal prosecution for willful abandonment relating to the same separation on which the divorce action is based bars his right to maintain an action under this section. *Taylor v. Taylor*, 257 N. C. 130, 125 S. E. (2d) 373 (1962).

Valid Separation Agreement Executed after Willful Abandonment. — Where an original separation is caused by the husband's abandonment of his wife, and subsequently the husband and wife enter into and execute a valid separation agreement, their separation agreement would seem to legalize their separation from and after the date thereof. *Richardson v. Richardson*, 257 N. C. 705, 127 S. E. (2d) 525 (1962).

Effect of Plaintiff's Failure to Pay Child Support Provided for by Separation Agreement. — Where all the evidence tends to show both plaintiff and defendant when they separated intended to cease their matrimonial cohabitation and thereafter live separate and apart and that they did so, this fact cannot be removed nor is its legal significance impaired by plaintiff's partial failure to pay the amounts he had agreed to pay, by a separation agreement, for the support of his children. *Richardson v. Richardson*, 257 N. C. 705, 127 S. E. (2d) 525 (1962).

Effect of Plaintiff's Misconduct before Separation. — Where husband and wife have lived together until their separation and then separated by mutual consent, defendant in the divorce action cannot attack the legality of their separation from and after the day of separation, on account of alleged misconduct while they were living

together. *Richardson v. Richardson*, 257 N. C. 705, 127 S. E. (2d) 525 (1962).

Antenuptial Agreement to Separate Immediately after Marriage. — Where the husband seeks to justify his separation from his wife on the ground of an antenuptial agreement that they would separate immediately after the marriage and obtain a divorce, the court of its own motion should take judicial notice that such agreement is contrary to public policy, and exceptions to the court's charge stating the husband's contentions in this respect will be sustained notwithstanding the absence of objection in the record to his allegations and evidence in support thereof. Plaintiff may not, on the grounds of such an agreement, exculpate himself from fault in leaving his wife after the marriage. *McLean v. McLean*, 237 N. C. 122, 74 S. E. (2d) 320 (1953).

Modification of Custody Order in Action under This Section. — An order awarding the custody of minor children determines the present rights of the parties but is not permanent in nature and is subject to modification for subsequent change of circumstance affecting the welfare of the children, and therefore an order of the court, entered pursuant to § 50-16, awarding the custody of the children to the wife, did not preclude another judge of the superior court from awarding custody of children to the husband in the wife's later action for absolute divorce under this section. *Thomas v. Thomas*, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

Nonsuit Properly Refused. — Where, in an action under this section, the testimony adduced by plaintiff is sufficient to establish that each of these things existed at the commencement of the action: That the plaintiff and defendant were husband and wife; that both of them had resided in the State for a period of six months; and that they had lived separate and apart within the meaning of the statute for an uninterrupted period of two years; the trial judge rightly refused to nonsuit the action. *Mallard v. Mallard*, 234 N. C. 654, 68 S. E. (2d) 247 (1951).

Applied in *Deaton v. Deaton*, 237 N. C. 487, 75 S. E. (2d) 398 (1953); *O'Briant v. O'Briant*, 239 N. C. 101, 79 S. E. (2d) 252 (1953); *Whitener v. Whitener*, 255 N. C. 731, 122 S. E. (2d) 705 (1961); *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963); *Richardson v. Richardson*, 261 N.C. 521, 135 S.E.2d 532 (1964); *Jones v. Jones*, 261 N.C. 612, 135 S.E.2d 554 (1964).

Cited in *Carter v. Carter*, 232 N. C. 614, 61 S. E. (2d) 711 (1950); *McLean v. Mc-*

Lean, 233 N. C. 139, 63 S. E. (2d) 138 (1951); Livingston v. Livingston, 235 N. C. 515, 70 S. E. (2d) 480 (1952); Carpenter v. Carpenter, 244 N. C. 286, 93 S. E. (2d) 617 (1956); Shaver v. Shaver,

244 N. C. 309, 93 S. E. (2d) 614 (1956); Shaver v. Shaver, 248 N. C. 113, 102 S. E. (2d) 791 (1958); Sears v. Sears, 253 N. C. 415, 117 S. E. (2d) 7 (1960).

§ 50-7. Grounds for divorce from bed and board.

Cross References.—

As to necessary allegations, see § 50-8 and note thereto.

Editor's Note.—For case law survey on alimony without divorce, see 41 N. C. Law Rev. 459.

A divorce from bed and board is nothing more than a judicial separation, that is, an authorized separation of the husband and wife. Such divorce merely suspends the effect of the marriage as to cohabitation, but does not dissolve the marriage bond. This is precisely the effect of an action under § 50-16, except that it is only available to the wife. Schlagel v. Schlagel, 253 N. C. 787, 117 S. E. (2d) 790 (1961).

Section 50-10 applies to a divorce from bed and board under this section. Schlagel v. Schlagel, 253 N. C. 787, 117 S. E. (2d) 790 (1961).

Prior Action under this Section Abates Action under § 50-6.—The pendency of a prior action by the wife for a divorce from bed and board upon the ground of abandonment under this section abates a subsequent action by the husband for an absolute divorce upon the ground of two years' separation under § 50-6. Cameron v. Cameron, 235 N. C. 82, 68 S. E. (2d) 796 (1952).

Grounds Available to Husband as Well as Wife.—

In accord with original. See Pruett v. Pruett, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

When the misconduct, etc.—

In accord with original. See Pressley v. Pressley, 261 N.C. 326, 134 S.E.2d 609 (1964).

Condonation.—

Condonation, of course, is forgiveness upon condition; and, if the condition is violated, the original offense is revived. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Nothing else appearing, the resumption of marital relations after a separation imports a condonation of previous offenses. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Condonation is an affirmative defense to be alleged and proved by the party relying upon it. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Less may be sufficient to destroy con-

donation than to found an original suit. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

It is not necessary for the plaintiff to establish all of the grounds for divorce a *mensa et thoro* alleged in her complaint in order to sustain her action. It is sufficient if she establishes the defendant's guilt of any of the acts that would constitute a cause of action for divorce from bed and board as enumerated in this section. Deaton v. Deaton, 234 N. C. 538, 67 S. E. (2d) 626 (1951); Pruett v. Pruett, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

Abandonment under Subsection 1 Not Synonymous with Offense Defined in § 14-322.—See Pruett v. Pruett, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

Acts Which Constitute Abandonment.—

A husband who permitted and encouraged certain of his grown children to remain constantly at home in a drunken condition, and allowed them to curse, abuse, and harass his wife at all hours of the day and night, and who told his wife to get her things out of his house, was guilty of such cruel treatment toward his wife as to constitute an abandonment of his wife. Bailey v. Bailey, 243 N. C. 412, 90 S. E. (2d) 696 (1956).

Plaintiff Must Prove That Abandonment Was Willful.—Where the wife sues the husband for a divorce from bed and board upon the ground of abandonment under this section, she must prove as an essential part of her case that her husband has willfully abandoned her. Cameron v. Cameron, 235 N. C. 82, 68 S. E. (2d) 796 (1952).

When Abandonment Justified.—The Supreme Court, in applying the provisions of subsection (1) of this section, has never undertaken to formulate any all-embracing definition or rule of general application respecting what conduct on the part of one spouse will justify the other in withdrawing from the marital relation, and each case must be determined in large measure upon its own particular circumstances. Ordinarily, however, the withdrawing spouse is not justified in leaving the other unless the conduct of the latter is such as would likely render it impossible for the withdrawing spouse to con-

tinue the marital relation with safety, health, and self-respect, and constitute ground in itself for divorce at least from bed and board. Caddell v. Caddell, 236 N.C. 686, 73 S.E. (2d) 923 (1952).

Fact That Husband Does or Does Not Support Wife as Evidence.—The husband's wilful failure to provide adequate support for his wife may be evidence of his abandonment of her, but the mere fact that he provides adequate support for her does not in itself negative abandonment. Pruett v. Pruett, 247 N.C. 13, 100 S.E. (2d) 296 (1957).

Defendant May Not Defeat Action by Making Voluntary Support Payments.—A defendant may not abandon his wife and defeat an action under this section by making voluntary payments which he may abandon at will. Thurston v. Thurston, 256 N.C. 663, 124 S.E. (2d) 852 (1962).

Resumption of Marital Relations.—A resumption of marital relations would invalidate a divorce *a mensa et thoro*. Rouse v. Rouse, 258 N.C. 520, 128 S.E. (2d) 865 (1963).

Instructions as to Burden of Proof Held Erroneous.—In an action for alimony without divorce on the ground of abandonment, an instruction that the wife had the burden of showing that the husband's separation from her was free of fault on her part and that she was blameless, is erroneous. Caddell v. Caddell, 236 N.C. 686, 73 S.E. (2d) 923 (1952).

In an action for alimony without divorce on the ground of abandonment, an instruction that plaintiff had the burden of proving that the defendant's separation was wrongful, without charging upon what phase or phases of the evidence defendant's separation would be wrongful, and without defining wrongful except in abstract terms, is insufficient. Caddell v. Caddell, 236 N.C. 686, 73 S.E. (2d) 923 (1952).

Necessary Allegations under Subsections 3 and 4.—A wife, in alleging a cause of action for divorce from bed and board under subsections 3 and 4, must set out with particularity the wrongful acts of the husband upon which she relies and also that such acts were without adequate provocation on her part. Ollis v. Ollis,

241 N.C. 709, 86 S.E. (2d) 420 (1955); Pruett v. Pruett, 247 N.C. 13, 100 S.E. (2d) 296 (1957).

Conduct of Defendant Must Be, etc.—

Plaintiff is required not only to set out with particularity those of her husband's acts which she contends constituted such indignities as to render her condition intolerable and her life burdensome but also to show that those acts were without adequate provocation on her part. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Cruelty and indignities, like other matrimonial offenses, may be condoned. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Breach of Forgiveness Must Be Particularized If Complaint Shows Condonation.—Where the complaint alleges cohabitation subsequent to the indignities relied upon, it must, in order to survive a demurrer, allege, as well, with the same particularity required in the first instance, the acts constituting and surrounding the breach of forgiveness. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

A complaint, touching upon plaintiff's claim for alimony, was held demurrable for condonation appearing upon its face, revival of the original cause not also sufficiently there appearing. Cushing v. Cushing, 263 N.C. 181, 139 S.E.2d 217 (1964).

Applied in Bunn v. Bunn, 258 N.C. 445, 128 S.E. (2d) 792 (1963); Adams v. Adams, 262 N.C. 556, 138 S.E.2d 204 (1964).

Quoted in Bateman v. Bateman, 232 N.C. 659, 61 S.E. (2d) 909 (1950); Bateman v. Bateman, 233 N.C. 357, 64 S.E. (2d) 156 (1951) (subsection 4); Johnson v. Johnson, 237 N.C. 383, 75 S.E. (2d) 109 (1953).

Cited in Livingston v. Livingston, 235 N.C. 515, 70 S.E. (2d) 480 (1952); Feldman v. Feldman, 236 N.C. 731, 73 S.E. (2d) 865 (1952); Morgan v. Brooks, 241 N.C. 527, 85 S.E. (2d) 869 (1955); McDowell v. McDowell, 243 N.C. 286, 90 S.E. (2d) 544 (1955); Rowland v. Rowland, 253 N.C. 328, 116 S.E. (2d) 795 (1960); Pickens v. Pickens, 258 N.C. 84, 127 S.E. (2d) 889 (1962).

§ 50-8. Contents of complaint; verification.—In all actions for divorce the complaint shall be verified in accordance with the provisions of G.S. 1-145 and G.S. 1-148. The plaintiff shall set forth in his or her complaint that the complainant or defendant has been a resident of the State of North Carolina for at least six months next preceding the filing of the complaint, and that the facts set forth therein as grounds for divorce have existed to his or her knowledge for at least six months prior to the filing of the complaint: Provided, however, that if the cause

for divorce is one year separation, then it shall not be necessary to allege in the complaint that the grounds for divorce have existed for at least six months prior to the filing of the complaint; it being the purpose of this proviso to permit a divorce after such separation of one year without awaiting an additional six months for filing the complaint: Provided, further, that if the complainant is a nonresident of the State action shall be brought in the county of the defendant's residence, and summons served upon the defendant personally.

In all prior suits and actions for divorce heretofore instituted and tried in the courts of this State where the averments of fact required to be contained in the affidavit heretofore required by this section are or have been alleged and set forth in the complaint in said suits or actions and said complaints have been duly verified as required by G.S. 1-145, said allegations so contained in said complaints shall be deemed to be, and are hereby made, a substantial compliance as to the allegations heretofore required by this section to be set forth in any affidavit; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce.

In all suits and actions for divorce heretofore instituted and tried in this State on and subsequent to the 5th day of April, 1951, wherein the statements, averments, or allegations in the verification to the complaint in said suits or actions are not in accordance with the provisions of G.S. 1-145 and 1-148 or the requirements of this section as to verification of complaint or the allegations, statements or averments in the verification contain the language that the facts set forth in the complaint are true "to the best of affiant's knowledge and belief" instead of the language "that the same is true to his (or her) own knowledge" or similar variations in language, said allegations, statements and averments in said verifications as contained in or attached to said complaint shall be deemed to be, and are hereby made, a substantial compliance as to the allegations, averments or statements required by this section to be set forth in any such verifications; and all such suits or actions for divorce, as well as the judgments or decrees issued and entered as a result thereof, are hereby validated and declared to be legal and proper judgments and decrees of divorce. (1868-9, c. 93, s. 46; 1869-70, c. 184; Code, s. 1287; Rev., s. 1563; 1907, c. 1008, s. 1; C. S., s. 1661; 1925, c. 93; 1933, c. 71, ss. 2, 3; 1943, c. 448, s. 1; 1947, c. 165; 1949, c. 264, s. 4; 1951, c. 590; 1955, c. 103; 1965, c. 636, s. 3; c. 751, s. 1.)

Editor's Note.—The 1951 amendment, effective July 1, 1951, rewrote this section. It also provided that, except for the second paragraph as rewritten, it did not apply to pending litigation.

The 1955 amendment added the third paragraph.

Chapter 636, s. 3, Session Laws 1965, as amended by c. 751, s. 1, Session Laws 1965, substituted "one year" for "two years" twice in the first proviso of the second sentence.

Section 3, c. 751, Session Laws 1965, provides: "This act shall be in full force and effect retroactively to May 20, 1965."

For brief comment on the 1951 amendment, see 29 N. C. Law Rev. 375.

Jurisdiction in divorce actions is conferred by statute. Israel v. Israel, 255 N. C. 391, 121 S. E. (2d) 713 (1961).

And Is Founded on Domicile.—Judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile.

Israel v. Israel, 255 N. C. 391, 121 S. E. (2d) 713 (1961).

The domicile of one spouse within a state gives power to that state to dissolve a marriage wheresoever contracted. Israel v. Israel, 255 N. C. 391, 121 S. E. (2d) 713 (1961).

To establish a domicile there must be a residence, and the intention to make it a home or to live there permanently or indefinitely. Israel v. Israel, 255 N. C. 391, 121 S. E. (2d) 713 (1961).

Residence Requirement Is Jurisdictional.—The requirement that one of the parties to a divorce action shall have resided in the state for a specified period of time next preceding the commencement of the action is jurisdictional. Israel v. Israel, 255 N. C. 391, 121 S. E. (2d) 713 (1961).

Domicile Defined.—That place is properly the domicile of a person where he has his true permanent home and principal establishment, and to which he has, whenever

he is absent, the intention of returning, and from which he has no present intention of moving. *Israel v. Israel*, 256 N. C. 391, 121 S. E. (2d) 713 (1961).

The domicile of a soldier or sailor in the military or naval service of his country generally remains unchanged, domicile being neither gained nor lost by being temporarily stationed in the line of duty at a particular place, even for a period of years. A new domicile may, however, be acquired if both the fact and the intent concur. *Israel v. Israel*, 255 N. C. 391, 121 S. E. (2d) 713 (1961).

Affidavit Not Required in Action under Section 50-16.—See note to § 50-16.

Verification in substantial compliance with § 1-145 was held sufficient. *Bolin v. Bolin*, 242 N. C. 642, 89 S. E. (2d) 303 (1955).

Effect of False Swearing on Decree.—If a decree of divorce, regular in all respects on the face of the judgment roll, is obtained by false swearing, by way of pleading and of evidence, relating to the cause or ground for divorce, the decree is voidable but not void, and is immune from attack by either party to the divorce. *Carpenter v. Carpenter*, 244 N. C. 286, 93 S. E. (2d) 617 (1956).

In an action for annulment of a marriage entered into between plaintiff husband and defendant wife following a decree of divorce in favor of defendant against her former husband, plaintiff, who had been married to defendant for six years, could not attack the divorce decree by alleging false swearing of defendant in regard to the ground or cause for divorce. *Carpenter v. Carpenter*, 244 N. C. 286, 93 S. E. (2d) 617 (1956).

Plaintiff Must Allege Material Facts Required by This Section.—To allege a cause of action for divorce, a plaintiff, in

addition to one or more of the grounds for divorce specified in § 50-5 or § 50-7, must allege the additional material facts now required by this section. *Pruett v. Pruett*, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

And Such Allegations Are Indispensable Constituent Elements of Cause of Action.—The legal effect of the 1951 amendment is that the allegations required to be set forth in the complaint are now indispensable constituent elements of plaintiff's cause of action and the facts so alleged must be established by the verdict of a jury. *Pruett v. Pruett*, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

Six Months Prior Knowledge.—

In accord with 1st paragraph in original. See *Carpenter v. Carpenter*, 244 N. C. 286, 93 S. E. (2d) 617 (1956).

While, in an action for divorce a mensa, it is advisable that the pleading allege that the facts set forth therein as ground for divorce had existed to complainant's knowledge for at least six months prior to the filing of the pleading in accordance with the language of the statute, where the wife's pleading in her cross-action for divorce a mensa alleges gross mistreatment of her by the husband, culminating in his locking her out of her home and ordering her away on a specified date more than six months prior to the filing of the pleading, with verification that the facts alleged therein are true to her own knowledge, her pleading will be held sufficient on this aspect. *Pruett v. Pruett*, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

Quoted in *Martin v. Martin*, 253 N. C. 704, 118 S. E. (2d) 29 (1961).

Cited in *Rowland v. Rowland*, 253 N. C. 328, 116 S. E. (2d) 795 (1960). *Pratt v. Bishop*, 257 N. C. 486, 126 S. E. (2d) 597 (1962).

§ 50-10. Material facts found by jury; parties cannot testify to adultery; waiver of jury trial in certain actions.—The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury, and on such trial neither the husband nor wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either party be received as evidence to prove such fact. Notwithstanding the above provisions, the right to have the facts determined by a jury shall be deemed to be waived in divorce actions based on a one year separation as set forth in G.S. 50-5 (4) or 50-6, where defendant has been personally served with summons, whether within or without the State, or where the defendant has accepted service of summons, whether within or without the State, unless such defendant, or the plaintiff, files a request for a jury trial with the clerk of the court in which the action is pending, prior to the call of the action for trial.

In all divorce actions tried without a jury as in this section provided the presiding judge shall answer the issues and render judgment thereon. (1868-9, c. 93, s. 47; Code, s. 1288; Rev., s. 1564; C. S., s. 1662; 1963, c. 540, ss. 1, 2; 1965, c. 105; c. 636, s. 4.)

Cross Reference.—See note to § 50-7.

Editor's Note. — The 1963 amendment, effective July 1, 1963, added the second sentence of the first paragraph. Section 2 of the amendatory act has been codified as the second paragraph of this section.

The first 1965 amendment added "whether within or without the State," following "served with summons," in the second sentence of the first paragraph.

The second 1965 amendment substituted "a one year" for "two (2) years" in the second sentence.

Provision on Evidence of Adultery Is Plain.—The provision of this section is so pointed and its language so plain—that in divorce trials, neither the husband nor the wife shall be a competent witness to prove the adultery of the other, nor shall the admissions of either be received as evidence to prove such fact—as to leave no room for doubt or construction. Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964), citing Perkins v. Perkins, 88 N.C. 41 (1883).

Facts That Must Be Alleged Must Be Proved.—Under this section and § 50-8, upon the basic principle that a plaintiff must prove what he must allege, a plaintiff is entitled to a judgment of divorce only if the issues submitted and answered in favor of the plaintiff establish, inter alia, (1) the requisite facts as to residence, and (2) that (except where the alleged cause for divorce is one year's separation) the facts set forth as grounds for divorce have existed to his or her knowledge for at least six months prior to the filing of the complaint. Pruett v. Pruett, 247 N. C. 13, 100 S. E. (2d) 296 (1957).

Material Facts Must Be Found by Jury.—This section requires that, in a divorce action, the material facts as to the grounds for divorce must be found by a jury. Wicker v. Wicker, 255 N. C. 723, 122 S. E. (2d) 703 (1961).

Thus Order in Habeas Corpus Proceeding Is Not Res Judicata in Divorce Action.—It is patent that an order entered in a

habeas corpus proceeding based on facts found by the trial judge is not res judicata to an action for divorce upon the ground of adultery. Wicker v. Wicker, 255 N. C. 723, 122 S. E. (2d) 703 (1961).

Questions for Determination by Judge and by Jury Distinguished.—In an action for divorce, the truth of the jurisdictional averments required by statute to be set forth in the affidavit is for the determination of the court, even though the judge, in his discretion, may submit such questions of fact to a jury and adopt the jury's findings; but averments referring to the grounds or cause of action for divorce set forth in the complaint, relate to issues of fact for the jury alone. Carpenter v. Carpenter, 244 N. C. 286, 93 S. E. (2d) 617 (1956).

Entry of Specific Denial by Defendant Not Prejudicial.—Since this section declares in effect that the material allegations of the complaint in a divorce action shall be deemed and treated as denied, it is inconsequential whether or not the defendant enters a denial, and the entry of a specific denial by the defendant, under discretionary leave of the court, cannot prejudice the plaintiff. Walker v. Walker, 238 N. C. 299, 77 S. E. (2d) 715 (1953).

Jury Trial of Divorce for Separation Is Waived by Failure to File Request. — A defendant waives his right to trial by jury in an action for divorce on the ground of two years' (now one year's) separation when he fails to file a request therefor prior to the call of the action for trial, and the fact that defendant had alleged a cross action for divorce for adultery does not affect this result when defendant withdraws his cross action before the case is called. Becker v. Becker, 262 N.C. 685, 138 S.E.2d 507 (1964).

Applied in Biggs v. Biggs, 253 N. C. 10, 116 S. E. (2d) 178 (1960); Richardson v. Richardson, 257 N. C. 705, 127 S. E. (2d) 525 (1962).

Cited in Blankenship v. Blankenship, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

§ 50-11. Effects of absolute divorce.—After a judgment of divorce from the bonds of matrimony, all rights arising out of the marriage shall cease and determine, and either party may marry again unless otherwise provided by law: Provided, that no judgment of divorce shall render illegitimate any children in esse, or begotten of the body of the wife during coverture; and, provided further, that except in case of divorce obtained with personal service on the wife, either within or without the State, upon the grounds of the wife's adultery and

except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period, a decree of absolute divorce shall not impair or destroy the right of the wife to receive alimony and other rights provided for her under any judgment or decree of a court rendered before the rendering of the judgment for absolute divorce. (1871-2, c. 193, s. 43; Code, s. 1295; Rev., s. 1569; 1919, c. 204; C. S., s. 1663; 1953, c. 1313; 1955, c. 872, s. 1.)

Editor's Note.—The 1953 amendment rewrote the second proviso.

The 1955 amendment, effective Jan. 1, 1956, inserted the words "and except in case of divorce obtained by the wife in an action initiated by her on the ground of separation for the statutory period" in the second proviso.

For note on permanent alimony incident to absolute divorce, see 31 N. C. Law Rev. 482.

Application of Amendments.—The 1953 and 1955 amendments to this statute are inapplicable to a 1951 judgment for absolute divorce. *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

Public policy respecting the effect of decrees of absolute divorce is to be found in the second proviso of this section as well as in the general enactment which the proviso qualifies. *Deaton v. Deaton*, 237 N. C. 487, 75 S. E. (2d) 398 (1953).

For other cases on the subject, see *Merritt v. Merritt*, 237 N. C. 271, 74 S. E. (2d) 529 (1953); *Livingston v. Livingston*, 235 N. C. 515, 70 S. E. (2d) 480 (1952); *Feldman v. Feldman*, 236 N. C. 731, 73 S. E. (2d) 865 (1953).

Second Proviso Applies Only to Decrees Rendered before Commencement of Divorce Proceedings.—The second proviso to this section applies only to decrees or judgments of the court for alimony rendered before the commencement of the proceeding for absolute divorce. *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

No Permanent Alimony.—

Pending a wife's action for alimony without divorce, the husband obtained decree of absolute divorce on the ground of two years' separation. It was held that the final judgment in her action would be rendered after absolute divorce, and therefore she would not be entitled to permanent alimony in her action, since under the common law she would not be entitled to alimony after a divorce a vin-

culo, and the proviso of this section would not be applicable. *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

A judgment for absolute divorce does not invalidate a judgment for alimony without divorce entered before the action for absolute divorce was instituted. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

When Prior Award of Alimony Terminated.—A decree of divorce on the ground of two years' separation in an action instituted by the wife terminates the wife's right to alimony without divorce under a prior decree. *Porter v. Citizens Bank of Warrenton*, 249 N. C. 173, 105 S. E. (2d) 669 (1958).

A Judgment for Subsistence, etc.—

In accord with original. See *Rayfield v. Rayfield*, 242 N. C. 691, 89 S. E. (2d) 399 (1955); *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

Counsel Fees for Enforcement of Subsistence Pendente Lite.—Since a wife's right to receive subsistence pendente lite is not destroyed by a judgment of absolute divorce, where her action for alimony without divorce is still pending, it would seem that the proviso in this section is broad enough to include counsel fees to the wife to enforce the payment to her of subsistence pendente lite in arrears, for without counsel her right to enforce such payments might be impaired or destroyed. *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

Applied in *Bowling v. Bowling*, 252 N. C. 527, 114 S. E. (2d) 228 (1960); *Biggs v. Biggs*, 253 N. C. 10, 116 S. E. (2d) 178 (1960); *Sears v. Sears*, 253 N. C. 415, 117 S. E. (2d) 7 (1960).

Quoted in *Taylor v. Taylor*, 257 N. C. 130, 125 S. E. (2d) 373 (1962).

Cited in *Kinross-Wright v. Kinross-Wright*, 248 N. C. 1, 102 S. E. (2d) 469 (1958); *Thurston v. Thurston*, 256 N. C. 663, 124 S. E. (2d) 852 (1962).

§ 50-11.1. Children born of voidable marriage legitimate.—A child born of voidable marriage or a bigamous marriage is legitimate notwithstanding the annulment of the marriage. (1951, c. 893, s. 2.)

Child of Bigamous Marriage Entitled to Proceeds of Insurance Policy on Father.—

Under this statute, there can be no question but that a child born of a bigamous

marriage is legitimate and as such is entitled to the proceeds of a policy of insurance issued to his deceased father pur-

suant to the Federal Employees' Group Life Insurance Act. *Varker v. Metropolitan Life Ins. Co.*, 184 F. Supp. 159 (1960).

§ 50-12. Resumption of maiden name or adoption of name of prior deceased husband.—Any woman at any time after the bonds of matrimony theretofore existing between herself and her husband have been dissolved by a decree of absolute divorce, may resume the use of her maiden name or the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband upon application to the clerk of the court of the county in which she resides, setting forth her intention so to do. Said application shall be addressed to the clerk of the court of the county in which such divorced woman resides, and shall set forth the full name of the former husband of the applicant, the name of the county in which said divorce was granted, and the term of court at which such divorce was granted, and shall be signed by the applicant in her full maiden name. The clerks of court of the several counties of the State shall provide a permanent book in which shall be recorded all such applications herein provided for, which shall be indexed under the name of the former husband of the applicant and under the maiden name of such applicant. The clerk of the court of the county in which said application shall be recorded shall charge a fee of one (\$1.00) dollar for such registration. The provisions of this section shall apply only in those cases in which the divorce decree is rendered by a court of competent jurisdiction of this State. In every case where a married woman has heretofore been granted a divorce and has, since the divorce, adopted the name of a prior deceased husband, or a name composed of her given name and the surname of a prior deceased husband, the adoption by her of such name is hereby validated. Provided that in the complaint or crossbill for divorce filed by any woman, she may petition the court for a resumption of her maiden name or the adoption by her of the name of a prior deceased husband, or of a name composed of her given name and the surname of a prior deceased husband, and upon the granting of the divorce in her favor, the court is authorized to incorporate in the divorce decree an order authorizing her to resume her maiden name or to adopt the name of a prior deceased husband or a name composed of her given name and the name of a prior deceased husband. (1937, c. 53; 1941, c. 9; 1951, c. 780; 1957, c. 394.)

Editor's Note. — The 1951 amendment The 1957 amendment added the proviso inserted the former next to last sentence. at the end of the section.

§ 50-13. Custody of children in divorce.—After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge of the court in which such application is or was pending to make such orders respecting the care custody, tuition and maintenance of the minor children of the marriage as may be proper, and from time to time to modify or vacate such orders, and may commit their custody and tuition to the father or mother, as may be thought best; or the court may commit the custody and tuition of such infant children, in the first place, to one parent for a limited time, and after the expiration of that time, then to the other parent; and so alternately: Provided, that no order respecting the children shall be made on the application of either party without five days' notice to the other party, unless it shall appear that the party having the possession or control of such children has removed or is about to remove the children, or himself, beyond the jurisdiction of the court.

Provided, custody of children of parents who have been divorced outside of North Carolina, and controversies respecting the custody of children not provided for by this section or § 17-39 of the General Statutes of North Carolina, may be determined in a civil action instituted by either of said parents, or by the surviving parent if the other be dead, in the superior court of the county wherein the child, at the time of the filing of the said petition, is a resident. The

resident or presiding judge of the district wherein the petition is filed may hear the facts and determine the custody of said children at any place that may be designated in his district after five days' notice of said proceedings to the defendant. Notice of the summons and petition in said proceedings may be served on a nonresident defendant by publishing a notice thereof setting forth the grounds and nature of the proceedings in a newspaper published in the county wherein the child resides once a week for a period of four successive weeks and by posting a copy thereof at the courthouse door of said county for a period of thirty days. Service as aforesaid in said action will be deemed complete thirty days after the date of the first publication of said notice.

In any case where either parent institutes a divorce action when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (1871-2, c. 193, s. 46; Code, ss. 1296, 1570; Rev., s. 1570; C. S., s. 1664; 1939, c. 115; 1941, c. 120; 1943, c. 194; 1949, c. 1010; 1953, c. 813; 1965, c. 310, s. 2.)

Cross Reference.—

As to examination of minor by judge in chambers without consent of parties to custody proceedings, see annotation to N. C. Const., Art. II, § 35.

Editor's Note.—

The 1953 amendment, effective July 1, 1953, changed the second paragraph by deleting "petitioner, or the respondent or" formerly appearing before the word "child" in line six, inserting "or presiding" near the beginning of the second sentence and substituting "child" for "petitioner" in the third sentence.

The 1965 amendment, effective July 1, 1965, substituted "civil action" for "special proceeding" in the first sentence of the second paragraph.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 407.

For note on jurisdictional and full faith and credit requirements of custody awards of minor children, see 30 N. C. Law Rev. 282.

For note on the domicile rule in custody proceedings, see 35 N. C. Law Rev. 83.

For case law survey on custody of children, see 41 N. C. Law Rev. 464.

Purpose of 1949 Amendment. — The second paragraph of this section as adopted by the 1949 amendment was designed (1) to meet the decision in *Phipps v. Vannoy*, 229 N. C. 629, 50 S. E. (2d) 906 (1948), in which it was held that the juvenile court has exclusive jurisdiction, and (2) to simplify proceedings to determine the custody of children in cases not arising under § 17-39. *Dellinger v. Bollinger*, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

Meaning of Word "Parents." — The word "parents" in this section and G. S. 49-1 and the word "parent" in G. S. 49-2 relate to the rights and duties of parents in respect to their children, and are in pari

materia. *Dellinger v. Bollinger*, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

Section 49-12 and this section must be construed in pari materia, and therefore where the reputed father of a child marries the child's mother after its birth, such child is deemed legitimate just as if it had been born in lawful wedlock (§ 49-12), and such child is a minor child of the marriage within the purview of this section, and the father may be required to furnish support for such child upon motion made either before or after decree of divorce. *Carter v. Carter*, 232 N. C. 614, 61 S. E. (2d) 711 (1950).

Civil Action to Obtain Custody of Illegitimate Child. — Under the 1949 amendment to this section either parent may institute a special proceeding (now civil action) to obtain custody of his or her child in cases not theretofore provided for by this section or by § 17-39 and this amendment authorizes such proceeding by the mother of an illegitimate child to obtain its custody from her aunt, with whom she had entrusted the child, and thus restricts the jurisdiction of the juvenile court in such instances. *In re Cranford*, 231 N. C. 91, 56 S. E. (2d) 35 (1949). See *Dellinger v. Bollinger*, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

Where the mother of an illegitimate child, after her marriage to a person not its father, institutes habeas corpus proceedings against her aunt with whom she had left the child, to regain its custody, and the respondent files answer and thus makes a general appearance and at no time challenges the jurisdiction of the court, the Supreme Court, in its discretion, will treat the petition as a proceeding under this section, and consider the appeal on its merits. *In re Cranford*, 231 N.C. 91, 56 S. E. (2d) 35 (1949).

The mother of a bastard child is its nat-

ural guardian, and, as such, has a legal right to its custody, care and control, if a suitable person, even though others may offer more material advantages in life for the child. But this rule is not absolute, and the custody of a bastard child may be taken from the mother, and placed elsewhere, where it clearly and manifestly appears that the best interests and welfare of the child demand it. *Wall v. Hardee*, 240 N. C. 465, 82 S. E. (2d) 370 (1954).

As against the right of the mother of an illegitimate child to its custody, the putative father may defend only on the ground that the mother, by reason of character or special circumstances, is unfit or unable to have the care of her child and that, for this reason, the welfare, or best interest, of the child overrides her paramount right to custody. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

It would be anomalous indeed if the law should sanction an award of custody to the putative father when there is a specific finding that the mother is now of good character and reputation and is a fit and suitable person to have the custody of minor children. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

Provision that the procedure herein provided may be used in "controversies respecting the custody of children not provided for by this section or § 17-39 of the General Statutes of North Carolina," is sufficiently broad and comprehensive to include a proceeding by a putative father for custody of his illegitimate child. *Dellinger v. Bollinger*, 242 N. C. 696, 89 S. E. (2d) 592 (1955).

The putative father of an illegitimate child, even though his right to custody is not primary, has such an interest in the welfare of his child that he can bring a proceeding against the mother under this section for its custody. *Jolly v. Queen*, 264 N.C. 711, 142 S.E.2d 592 (1965).

Court Acquires Jurisdiction of Child as Well as Parent.—In a custody case, the court acquires jurisdiction of the child as well as the parent, and the child thus becomes a ward of the court. *Joyner v. Joyner*, 256 N. C. 588, 124 S. E. (2d) 724 (1962).

Jurisdiction Exclusive.—

In accord with 1st paragraph in original. See *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

When a divorce action is instituted, jurisdiction over the custody of the children born of the marriage vests exclusively in the court before whom the divorce action is pending and becomes a concomitant

part of the subject matter of the court's jurisdiction in the divorce action. *Cox v. Cox*, 246 N. C. 528, 98 S. E. (2d) 879 (1957).

When the plaintiff instituted his action for divorce from bed and board in the superior court, in which he specifically prayed "that the court determine the proper custody for the aforesaid minor child of the plaintiff and defendant," that court became vested in his suit with exclusive jurisdiction to enter orders respecting the care, custody and maintenance of this child. *Bunn v. Bunn*, 258 N. C. 445, 128 S. E. (2d) 792 (1963).

Extent of Jurisdiction.—

After the filing of a complaint in any action for divorce, whether from the bonds of matrimony or from bed and board, both before and after final judgment therein, it is lawful for the judge to make such orders respecting the care, custody, tuition and maintenance of the minor children of the marriage as may be proper. *Coggins v. Coggins*, 260 N.C. 765, 133 S.E.2d 700 (1963).

A controversy concerning child custody and support accompanies, is collaterally connected with, and is incidental to, an action for divorce or for alimony without divorce, but may not be determined under this section and § 50-16 when it is the only cause of action alleged, except in those special and unusual circumstances provided for in the second paragraph of this section. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Jurisdiction of Juvenile Court. — The juvenile court, under § 110-21, has exclusive original jurisdiction of a child under sixteen years of age "whose custody is subject to controversy" in all cases except those in which the superior court is given jurisdiction by § 17-39 or this section. *In re Custody of Simpson*, 262 N.C. 206, 136 S.E.2d 647 (1964).

Jurisdiction Not Ousted, etc.—

In accord with original. See *Weddington v. Weddington*, 243 N. C. 702, 92 S. E. (2d) 71 (1956).

Institution of Divorce Action Does Not Oust Jurisdiction of Prior Action to Determine Custody.—There is nothing in this section to the effect that institution of a divorce action ousts jurisdiction of another court, previously acquired, to determine the rights of custody of the children of the marriage. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

Effect of Appeal.—An appeal removes the entire proceeding to the Supreme Court and leaves the superior court functus

officio until the cause is remanded, and this seems to be true even in custody cases both as to the order of custody and as to allowance for the child's support. *Joyner v. Joyner*, 256 N.C. 588, 124 S.E. (2d) 724 (1962).

Proceeding Is in Rem.—

In accord with original. See *Hoskins v. Curran*, 242 N.C. 432, 88 S.E. (2d) 228 (1955).

An action which relates to the custody of a child is in the nature of an in rem proceeding. Therefore, the child is the res over which the court must have jurisdiction before it may enter a valid and enforceable order. *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E. (2d) 96 (1957).

Jurisdiction to Award Custody of Children Without the State.—

Court did not have jurisdiction to award custody of a child in a custody proceeding filed after divorce decree where child was with the father, a nonresident. *Weddington v. Weddington*, 243 N.C. 702, 92 S.E. (2d) 71 (1956).

Where Divorce Decree Entered in Another State.—

Where a court of a foreign jurisdiction has entered a divorce decree and order concerning the custody of the children, unless the children were domiciled in North Carolina at the time the proceeding under this section was instituted, the North Carolina court is without jurisdiction to award their custody, except in conformity with the foreign decree theretofore entered. *Allman v. Register*, 233 N.C. 531, 64 S.E. (2d) 861 (1951).

A modification of the provisions of a foreign divorce decree in regard to the custody of a minor child of the marriage, entered in the foreign jurisdiction while the child of the marriage was domiciled in this State with her resident grandfather, is not binding on the courts of this State, and does not come under the full faith and credit clause of the federal Constitution, Article IV, § 1. *Kovacs v. Brewer*, 245 N.C. 630, 97 S.E. (2d) 96 (1957).

Notice of Motion for Custody Served on Counsel of Record.—A court which acquired jurisdiction of husband in a divorce proceeding before he left the State had jurisdiction to hear motion for custody filed after divorce decree where notice of motion was served on husband's counsel of record. *Weddington v. Weddington*, 243 N.C. 702, 92 S.E. (2d) 71 (1956).

Ability to Pay Considered.—Ordinarily, in entering a judgment for the support of a minor child, the ability to pay as well as the needs of such child will be taken

into consideration. *Bishop v. Bishop*, 245 N.C. 573, 96 S.E. (2d) 721 (1957); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963); *Coggins v. Coggins*, 260 N.C. 765, 133 S.E.2d 700 (1963).

In a support proceeding the issue before the court involves a consideration of the needs of the children, and an order for their maintenance in an amount fair and not confiscatory in the light of the father's earning ability. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

And Also Father's Living Expenses.—In determining the amount of an order for the support of children a reasonable allowance should be made for the living expenses of their father in the light of his earnings. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Dividing His Income by Number of Dependents Is Disapproved. — Fixing the amount of support for minor children by dividing the income of the husband by the number of people dependent upon him for support is not approved. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

The welfare of the child at the time, etc.—

In accord with 2nd paragraph in original. See *Finley v. Sapp*, 238 N.C. 114, 76 S.E. (2d) 350 (1953).

The welfare of the child in controversies involving custody is the polar star by which the courts must be guided in awarding custody. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E. (2d) 871 (1963).

Court May Disregard Agreement, etc.—

The fact that petitioner agreed when the separation took place between her and her husband that the custody of their child should remain with the father is not binding on the court. *Finley v. Sapp*, 238 N.C. 114, 76 S.E. (2d) 350 (1953).

Valid separation agreements, including consent judgments based on such agreements with respect to marital rights, are not final and binding as to the custody of minor children or as to the amount to be provided for the support and education of such minor children. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Provisions in a deed of separation for support of the minor children of the marriage, entered as a consent judgment by the court, cannot deprive the superior court of its inherent and statutory authority to protect the interests and provide for the welfare of the infants, and therefore judgment increasing the allowance for the minor children upon findings of change of circumstances warranting such increase, will be affirmed. *Bishop*

v. Bishop, 245 N. C. 573, 96 S. E. (2d) 721 (1957).

No agreement or contract, etc.—

In accord with 1st and 2nd sentences in original. See Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

But provisions of a valid separation agreement, including a consent judgment based thereon, cannot be ignored or set aside by the court without the consent of the parties. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Amount Set by Agreement Is Presumptively Just and Reasonable.—Where parties to a separation agreement agree upon the amount for the support and maintenance of their minor children, there is a presumption in the absence of evidence to the contrary, that the amount mutually agreed upon is just and reasonable. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

Wide Discretionary Power Is Vested in Trial Court.—In applying the provisions of this section, the decisions of the Supreme Court, while emphasizing that the welfare of the child is always to be treated as the paramount consideration, to which even parental love must yield, recognize that wide discretionary power is necessarily vested in the trial court in reaching decisions in particular cases. Griffin v. Griffin, 237 N. C. 404, 75 S. E. (2d) 133 (1953).

And Its Findings of Fact Based on Competent Evidence Are Ordinarily Conclusive.—The rule is well established that findings of fact by the trial court in a proceeding to determine the custody of a minor child ordinarily are conclusive when based on competent evidence. Griffin v. Griffin, 237 N. C. 404, 75 S. E. (2d) 133 (1953).

In a hearing to determine the right to custody of the children of the marriage, the court's findings of fact are conclusive if supported by competent evidence. Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

Award Not Disturbed Unless Discretion Abused.—The amount to be allowed for the support of the children of the marriage in proceedings under this section is within the sound discretion of the trial judge and will not be disturbed except where such discretion has been grossly abused. Coggins v. Coggins, 260 N.C. 765, 133 S.E.2d 700 (1963).

Court May Divide Custody between Parents or Award General Custody Subject to Visitation Privileges.—This section confers upon the trial court discretionary power either to divide custody between contending parents for alternating periods, or to

award general custody to one parent subject to visitation privileges in favor of the unsuccessful parent. Griffin v. Griffin, 237 N. C. 404, 75 S. E. (2d) 133 (1953).

Jury Trial.—Whether a child is a "minor child of the marriage" within the purview of this section may be a question of fact rather than an issue of fact, but so, the trial court may call a jury to its aid to hear the evidence and determine the question. Carter v. Carter, 232 N. C. 614, 61 S. E. (2d) 711 (1950).

Order for Custody Not Entered in Later Action for Subsistence.—Jurisdiction over the custody of the children born of the marriage rests exclusively in the court before whom the divorce action is pending, and no order for the custody of the children may be entered in a later action by one of the parties for subsistence without divorce. Reece v. Reece, 231 N. C. 321, 56 S. E. (2d) 641 (1949).

Modification of Decree.—

In accord with 1st paragraph in original. See Griffin v. Griffin, 237 N. C. 404, 75 S. E. (2d) 133 (1953).

All decrees with respect to custody and support of minor children are subject to further orders of the court. Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

A judgment for the support of a minor child or children is subject to alteration upon a change of circumstances affecting the welfare of the child or children. Fuchs v. Fuchs, 260 N.C. 635, 133 S.E.2d 487 (1963).

A decree awarding the custody of minor children determines the present rights of the parties to the contest with respect to such custody, is not permanent in its nature, and is subject to judicial alteration or modification upon a change of circumstances affecting the welfare of the children. This is one of the exceptions to the general rule that ordinarily one superior court judge has no power to alter, modify, or reverse the judgment of another superior court judge previously made in the same action. Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

An order of the court, entered pursuant to § 50-16, awarding custody of the children to the wife did not preclude another judge of the superior court from awarding custody of the children to the husband in the wife's later action for absolute divorce under § 50-6. Thomas v. Thomas, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

Wife who had gone out of State after she had been awarded custody of children and

who later returned with a bastard child begotten on her body was a change of circumstances affecting the welfare of the children, which empowered the court to alter or modify the custody order if it was deemed necessary to do so to further the welfare of the children. *Thomas v. Thomas*, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

A change of condition and circumstances must be established before an order for the support of children and permanent alimony can be modified. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

The court upon motion for an increase in allowance for support of minor children is not warranted in ordering an increase in the absence of any evidence of a change in conditions or of the need for such increase, particularly when the increase is awarded solely on the ground that the father's income has increased, therefore, he is able to pay a larger amount. *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Custody of Grandparents.—

Where the court's conclusions that the mother was an unfit person to have custody of the children and that the father was a fit and suitable person to have their custody was supported by the findings, and it further appeared that neither the father nor the paternal grandparents had a suitable home for the children but that the maternal grandparents, with whom the children were then living, had such a home, order awarding the custody of the children to the father on condition that the physical custody of the children be vested in their maternal grandparents and the father pay for their support, would not be disturbed on appeal, the welfare of the children being the determinative factor in the award of custody. *Thomas v. Thomas*, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

Child Is under Protective Custody of Court.—Even though an order requiring the husband to make payments for the support of his child was entered by consent of the parents, the child was under the protective custody of the court. *Smith v. Smith*, 247 N. C. 223, 100 S. E. (2d) 370 (1957).

Decree Subject to Alteration upon Change of Circumstances.—A decree for the support of a minor child is subject to alteration upon a change of circumstances affecting the welfare of the child. *Bishop v. Bishop*, 245 N. C. 573, 96 S. E. (2d) 721 (1957).

Conviction of Abandonment Did Not Preclude Finding of Fitness.—The fact that the father had been convicted of

abandonment of his children and ordered to provide for their support did not preclude the court from finding upon a hearing of a subsequent motion for the custody of the children in a divorce action that the father was a fit and suitable person to have custody of the children when there was uncontradicted evidence upon the hearing that the father had a good reputation in the community in which he lived. *Thomas v. Thomas*, 259 N. C. 461, 130 S. E. (2d) 871 (1963).

Modification of Decree Entered by Court of Another State.—Where parents were divorced in Nevada, decree providing for support of children by father, a resident of North Carolina, and Nevada law provided for modification of support decrees, the superior court was held to have jurisdiction to consider and adjudicate the question of adequacy of that support. However, the Nevada decree is binding on North Carolina courts under the full faith and credit clause of the Constitution of the United States unless the plaintiffs show such changed conditions and circumstances as to justify an increase in the allowance made by the Nevada court. *Thomas v. Thomas*, 248 N. C. 269, 103 S. E. (2d) 371 (1958).

Decree Awarding Custody to Grandfather Affirmed.—See *Kovacs v. Brewer*, 245 N. C. 630, 97 S. E. (2d) 96 (1957).

Refusal to Modify Custody Decree Where Child Actually in Custody of Another Married Couple.—See *Fearington v. Fearrington*, 251 N. C. 694, 111 S. E. (2d) 850 (1960).

Effect of Defendant's Petition for Custody on Plaintiff's Right to Voluntary Nonsuit.—A wife instituted action for divorce and defendant husband filed his petition in the cause praying the court for a determination of his custodial rights with respect to the child. The defendant in petitioning for the custody of the child was seeking affirmative relief of a substantial nature. This being so, it was not within the power of the clerk to divest the superior court of its jurisdiction by allowing the plaintiff to submit to a voluntary nonsuit during the course of the hearings and while the issue of custody was in fieri before the presiding judge. *Cox v. Cox*, 246 N. C. 528, 98 S. E. (2d) 879 (1957).

Applied in *Gafford v. Phelps*, 235 N. C. 218, 69 S. E. (2d) 313 (1952); *Raper v. Berrier*, 246 N. C. 193, 97 S. E. (2d) 782 (1957).

Cited in *James v. Pretlow*, 242 N. C.

102, 86 S. E. (2d) 759 (1955); Richter v. Harmon, 243 N. C. 373, 90 S. E. (2d) 744 (1956); Kovacs v. Brewer, 356 U. S. 604, 78 S. Ct. 963, 2 L. Ed. (2d) 1008 (1958).

§ 50-14. Alimony on divorce from bed and board.

The limitation imposed by this section is not applicable when plaintiff seeks alimony pendente lite or without divorce, but the limitation expressed herein ought not to be completely ignored when the court is called upon to make an award as provided by § 50-16. Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960).

But Is Applicable Only to Divorce a Mensa et Thoro.—Except when the allowance is made following a decree of divorce a mensa et thoro, the court, in making the allowance, is not confined to a one-third part of the defendant's net annual income. Harris v. Harris, 258 N. C. 121, 128 S. E. (2d) 123 (1962).

Court on a Decree for Divorce a Mensa et Thoro Can Order Permanent Alimony.—The court had the power when it rendered a judgment granting defendant a divorce a mensa et thoro to decree in the judgment that the plaintiff should pay permanent alimony for the subsistence of defendant and their infant children. Rayfield v. Rayfield, 242 N. C. 691, 89 S. E. (2d) 399 (1955).

And Award Can Be Increased When Changed Circumstances Require It.—An

award of subsistence for defendant and the children born of the marriage, decreed by a court under this section in conjunction with a divorce a mensa et thoro, before the commencement of a proceeding by the wife for a divorce a vincula under the provisions of § 50-6, which she obtained, can be increased in amount by the court in its discretion, on her motion in the action when and where subsistence was awarded, when changed circumstances of the parties reasonably require it. Rayfield v. Rayfield, 242 N. C. 691, 89 S. E. (2d) 399 (1955).

But There Can Be No Award Where Husband Has Performed Separation Agreement.—Where the wife sought a divorce a mensa and alimony notwithstanding the provision of a valid separation agreement which the husband had "fully performed," she could not, after her husband had performed his part of the contract, obtain an award of alimony. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

Cited in Feldman v. Feldman, 236 N. C. 731, 73 S. E. (2d) 865 (1953); Holden v. Holden, 245 N. C. 1, 95 S. E. (2d) 118 (1956).

§ 50-15. Alimony pendente lite; notice to husband.—If any married woman applies to a court for a divorce from the bonds of matrimony, or from bed and board, with her husband, and sets forth in her complaint such facts, which upon application for alimony shall probably entitle her to the relief demanded in the complaint, and it appears to the judge of such court, either in or out of term, by the affidavit of the complainant, or other proof, that she has not sufficient means whereon to subsist during the prosecution of the suit, and to defray the necessary and proper expenses thereof, it shall be lawful for such judge to order the husband to pay her such alimony during the pendency of the suit as appears to him just and proper, having regard to the circumstances of the parties; and such order may be modified or vacated at any time, on the application of either party or of anyone interested: Provided, that no order allowing alimony pendente lite shall be made unless the husband shall have had five days' notice thereof, and in all cases of application for alimony pendente lite under this or § 50-16, whether in or out of term, it shall be admissible for the husband to be heard by affidavit in reply or answer to the allegations of the complaint: Provided further, that if the husband has abandoned his wife and left the State or is in parts unknown, or is about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice is necessary. All motions pendente lite made under this section may be heard in the same manner, at the same places, and by the same judges as motions pendente lite are now heard under § 50-16. (1871-2, c. 193, s. 38; 1883, c. 67; Code, s. 1291; Rev., s. 1566; C. S., s. 1666; 1961, c. 80.)

I. IN GENERAL.

Editor's Note.—

The 1961 amendment, effective July 1,

1961, substituted in line four the word "probably" for the words "be found by the judge to be true and to." It also de-

leted the words "the judge may" in line eight and inserted in lieu thereof the words "it shall be lawful for such judge to." It further added the last sentence.

As to basis of award of alimony pendente lite in North Carolina, see 39 N. C. Law Rev. 189.

Purpose, etc.—

The granting of alimony pendente lite is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Right to Alimony Pending Trial Is Grounded on Common Law.—The right of a defendant wife to an allowance for her subsistence pending trial and for counsel fees in a suit for absolute divorce by her husband is not derived from this section or from § 50-16 but is grounded on the common law. *Branon v. Branion*, 247 N. C. 77, 100 S. E. (2d) 209 (1957).

Common-Law Principle Not Abrogated.—This section does not abrogate the principle on which alimony was allowed at common law. *Cameron v. Cameron*, 231 N. C. 123, 56 S. E. (2d) 384 (1949).

Alimony When the Wife Is Defendant.—When the husband sues the wife for an absolute divorce, the wife may plead a cause of action for divorce from bed and board as a cross action, and obtain upon a proper showing allowances from the estate or earnings of her husband for her support during the pendency of the action and for counsel fees for her attorneys. *Johnson v. Johnson*, 237 N. C. 383, 75 S. E. (2d) 109 (1953).

Since the decision to the contrary in *Reeves v. Reeves*, 82 N. C. 348 (1880), is expressly abrogated in *Medlin v. Medlin*, 175 N. C. 529, 95 S. E. 857 (1918), the wife may be allowed alimony pending the action and counsel fees in a suit against her for divorce, even though she seeks no affirmative relief and merely endeavors to defeat her husband's case. It follows, therefore, that in an action by the husband for an absolute divorce, the wife may deny the validity of the cause of action alleged by the husband, or plead an affirmative defense to it, and obtain upon a proper showing in either event allowances from the estate or earnings of the husband for her support during the pendency of the action and for counsel fees for her attorneys. *Johnson v. Johnson*, 237 N. C. 383, 75 S. E. (2d) 109 (1953).

Applied in *Phillips v. Phillips*, 241 N. C. 617, 86 S. E. (2d) 95 (1955).

Quoted in *Ipock v. Ipock*, 233 N. C. 387, 64 S. E. (2d) 283 (1951).

Cited in *Livingston v. Livingston*, 235 N. C. 515, 70 S. E. (2d) 480 (1952); *Morris v. Wilkins*, 241 N. C. 507, 85 S. E. (2d) 892 (1955); *Bolin v. Bolin*, 242 N. C. 642, 89 S. E. (2d) 303 (1955); *Sguros v. Sguros*, 252 N. C. 408, 114 S. E. (2d) 79 (1960).

II. APPLICATION AND PROCEEDINGS THEREON.

In passing on a motion for alimony pendente lite the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Presumption.—When the trial judge allows alimony under this section, and there is evidence sufficient to sustain his action, it is presumed: (1) That he found the facts and resolved them in the wife's favor and (2) that it appeared to him that the wife lacked sufficient means on which to subsist during the pendency of the suit. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Where Motion May Be Heard.—

Insofar as the alimony pendente lite and counsel fees for the plaintiff are concerned, a hearing could be held on proper notice anywhere in the judicial district. *Joyner v. Joyner*, 256 N. C. 588, 124 S. E. (2d) 724 (1962).

III. PREREQUISITES TO AWARD.

Wife's Need for Temporary Alimony.—The 1961 amendment did not materially change the wording of this section with reference to the wife's need for temporary alimony as a requirement for an award. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Necessity for Finding of Facts.—

Prior to 1961, when this section was amended, for a wife to obtain temporary alimony under this section, the requirement of this section was that she set forth in her complaint facts which would entitle her to the relief demanded, which facts "shall be found by the judge to be true." *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

The 1961 amendment removed from this section the requirement that the judge make specific findings that the facts set forth in the complaint are true and entitle plaintiff to the ultimate relief demanded therein as a condition precedent to an

award pendente lite. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Apparently, the purpose of the 1961 amendment was to eliminate the distinction between this section and § 50-16 insofar as finding the facts with reference to the truth of the allegations of the complaint is concerned. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

But the 1961 amendment to this section does not dispense with the requirement that the judge hear the evidence of both parties and determine in his sound legal discretion whether movant is entitled to the relief sought. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

There is, and has been, no requirement in this section that the judge shall find specific facts with reference to the wife's financial condition. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Validity of Separation Agreement Need Not Be First Determined.—The cases of *Oldham v. Oldham*, 225 N.C. 476, 35 S.E.2d 332 (1945) and *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171 (1929), holding that in an action for alimony without divorce the validity or reasonableness of a

separation agreement need not be determined before the court can award temporary allowances, although decided under § 50-16, are equally applicable to a motion for temporary alimony under this section, pending the trial of an action for divorce from bed and board. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Where the wife is charged with adultery in a suit for absolute divorce by her husband, before she is entitled to an allowance for subsistence and counsel fees, the court must find as a fact that her denial under oath of the alleged adultery was made in good faith; and before making this determination the court must hear the evidence of the parties. *Branon v. Branor*, 247 N.C. 77, 100 S.E. (2d) 209 (1957).

VI. PLEADING AND PRACTICE.

Exceptions.—Where it affirmatively appears the defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, an exception thereto will be sustained. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

§ 50-16. Alimony without divorce; custody of children.—If any husband shall separate himself from his wife and fail to provide her and the children of the marriage with the necessary subsistence according to his means and condition in life, or if he shall be a drunkard or spendthrift, or be guilty of any misconduct or acts that would be or constitute cause for divorce, either absolute or from bed and board, the wife may institute an action in the superior court of the county in which the cause of action arose to have a reasonable subsistence and counsel fees allotted and paid or secured to her from the estate or earnings of her husband, or she may set up such cause of action as a cross action in any suit for divorce, either absolute or from bed and board; and the husband may seek a decree of divorce, either absolute or from bed and board, in any action brought by his wife under this section. Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the superior court, or the judge holding the superior courts of the district in which the action is brought or any judge holding a term of superior court, either civil or criminal, in the county in which the action is brought, for an allowance for such subsistence and counsel fees, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife. Such application may be heard in or out of term, orally or upon affidavit, or either or both. No order for such allowance shall be made unless the husband shall have had five days' notice thereof; but if the husband shall have abandoned his wife and left the State, or shall be in parts unknown, or shall be about to remove or dispose of his property for the purpose of defeating the claim of his wife, no notice shall be necessary. The order of allowance herein provided for may be modified or vacated at any time, on the application of either party or of any one interested. In actions brought under this section, the wife shall not be required to file the affidavit provided in § 50-8,

but shall verify her complaint as prescribed in the case of ordinary civil actions: Provided further, that in all applications for alimony under this section it shall be competent for the husband to plead the adultery of the wife in bar of her right to such alimony, and if the wife shall deny such plea, and the issue be found against her by the judge, he shall make no order allowing her any sum whatever as alimony, or for her support, but only her reasonable counsel fees.

In a proceeding instituted under this section, the plaintiff or the defendant may ask for custody of the children of said parties, either in the original pleadings or in a motion in the cause. Whereupon, the court may enter such orders in respect to said custody as might be entered upon a hearing on a writ of habeas corpus issued for the purpose of determining the custody of said children. Such request for custody of the children shall be in lieu of a petition for a writ of habeas corpus, but it shall be lawful for the custody of said children to be determined upon a writ of habeas corpus, provided the petition for said writ is filed prior to the filing of said pleadings or motion for such custody in the cause instituted under this section.

The court may enter orders in a proceeding under this section relating to the support and maintenance of the children of the plaintiff and the defendant in the same manner as such orders are entered by the court in an action for divorce, irrespective of what may be the rights of the wife and the husband as between themselves in such proceeding.

In any action instituted by the wife under the provisions of this section when there is a minor child or children, the complaint in such action shall set forth the name and age of such child or children; and if there be no minor child, the complaint shall so state. (1871-2, c. 193, s. 39; Code, s. 1292, Rev., s. 1567; 1919, c. 24; C. S., s. 1667; 1921, c. 123; 1923, c. 52; 1951, c. 893, s. 3; 1953, c. 925; 1955, cc. 814, 1189.)

VII. Custody and Support of Children.

I. GENERAL CONSIDERATION.

Editor's Note.—

The 1951 amendment inserted in the second sentence the words "or any judge holding a term of superior court, either civil or criminal, in the county in which the action is brought."

The 1953 amendment added the second paragraph.

The first 1955 amendment, effective July 1, 1955, added all that part of the first sentence which follows the word "husband" in line eight. The second 1955 amendment, effective January 1, 1956, added the last two paragraphs.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 407.

As to basis of the award of alimony pendente lite in North Carolina, see 39 N. C. Law Rev. 189.

This section was enacted to establish an efficient procedure for enforcement of the marital right of the wife to support by the husband. Such right does not exist, however, in favor of a wife who has abandoned her husband without just cause. Reece v. Reece, 232 N. C. 95, 59 S. E. (2d) 363 (1950).

Suits Are within Analogy o. Divorce Laws.—Suits for alimony without divorce are within the analogy of divorce laws.

Blankenship v. Blankenship, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

Two separate remedies are provided, etc.

In accord with 1st paragraph in original. See Bateman v. Bateman, 233 N. C. 357, 64 S. E. (2d) 156 (1951); Yow v. Yow, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

The statute provides two remedies—one, for alimony without divorce; and the other, for a reasonable subsistence and counsel fees pendente lite. Forgartie v. Forgartie, 236 N. C. 188, 72 S. E. (2d) 226 (1952).

Temporary and permanent alimony may both be awarded under this section. Yow v. Yow, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

Action Not Abated by Prior Action of Husband for Absolute Divorce.—The prior institution of an action by the husband for an absolute divorce does not abate the wife's subsequent action for alimony without divorce, or deprive the court of power to award her alimony and counsel fees pendente lite therein. Reece v. Reece, 231 N. C. 321, 56 S. E. (2d) 641 (1949).

Notwithstanding the first 1955 amendment to this section, permitting the wife to set up her cause of action for alimony without divorce as a cross action in her

husband's action for divorce, the pendency of the husband's action for absolute divorce under § 50-6 is not ground for abatement of the wife's subsequent action for alimony without divorce under this section. *Beeson v. Beeson*, 246 N. C. 330, 98 S. E. (2d) 17 (1957), commented on in 36 N. C. Law Rev. 203.

Section Permits but Does Not Require Wife to Set Up Right in Cross Action.—The 1955 amendment to this section merely gives a wife the right to set up a cross action for alimony without divorce in the husband's suit for divorce, either absolute or from bed and board, without disturbing the right of the wife to bring an independent action under the statute for alimony without divorce, the alternate procedure being permissive but not mandatory. *Beeson v. Beeson*, 246 N. C. 330, 98 S. E. (2d) 17 (1957).

This section specifically authorizes the wife to assert a cause of action for alimony without divorce as a cross action in the husband's suit for divorce. *Scott v. Scott*, 259 N. C. 642, 131 S. E. (2d) 478 (1963).

Notice of Cross Action Does Not Preclude Taking of Voluntary Nonsuit.—Plaintiff in an action for absolute divorce is entitled as a matter of right to take a voluntary nonsuit upon paying costs and alimony pendente lite to the date of motion, notwithstanding he has notice of defendant's intention to file a cross action for alimony without divorce, and, the nonsuit having been taken, no action is pending in which defendant may amend her answer to assert such cross action. *Scott v. Scott*, 259 N. C. 642, 131 S. E. (2d) 478 (1963).

The rule that plaintiff is entitled as a matter of right to take a voluntary nonsuit if defendant has not set up a counterclaim arising out of the same transaction alleged in the complaint, is held to apply to actions for divorce. *Scott v. Scott*, 259 N. C. 642, 131 S. E. (2d) 478 (1963).

Issues Where Claim for Alimony Based upon § 50-7.—Where the wife's claim for alimony without divorce under this section was based upon § 50-7, the issues submitted to the jury should have been framed upon the allegations in the pleadings and the evidence introduced under those allegations, with reference to the provisions of § 50-7 upon which the plaintiff relied as grounds for divorce from bed and board. *Bateman v. Bateman*, 232 N. C. 659, 61 S. E. (2d) 909 (1950).

Effect of Reconciliation and Resumption of Marital Relations.—Where an order for alimony pendente lite has been rendered under this section, but subsequent thereto

there is a reconciliation and a resumption of marital relations in the home, the necessity for alimony ceases, and a judge of the superior court has no power to reactivate the order for alimony pendente lite. However, the original cause is still pending and upon a subsequent separation and need for subsistence for the wife, the courts are open for whatever relief may be justified by the situation then existing. *Hester v. Hester*, 239 N. C. 97, 79 S. E. (2d) 248 (1953).

And of Wife Not Demanding Support.—The mere fact that the wife does not demand that the husband support her does not excuse him from the performance of his duty. *Bowling v. Bowling*, 252 N. C. 527, 114 S. E. (2d) 228 (1960).

Applied in Deaton v. Deaton, 237 N. C. 487, 75 S. E. (2d) 398 (1953); *Jarrell v. Jarrell*, 241 N. C. 73, 84 S. E. (2d) 328 (1954); *Bishop v. Bishop*, 245 N. C. 573, 96 S. E. (2d) 721 (1957); *Whitener v. Whitener*, 255 N. C. 731, 122 S. E. (2d) 705 (1961); *Mills v. Mills*, 257 N. C. 663, 127 S. E. (2d) 232 (1962); *Kiger v. Kiger*, 258 N. C. 126, 128 S. E. (2d) 235 (1962); *Coe v. Coe*, 261 N.C. 174, 134 S.E.2d 197 (1964); *Pressley v. Pressley*, 261 N.C. 326, 134 S.E.2d 609 (1964); *Bunn v. Bunn*, 262 N.C. 67, 136 S.E.2d 240 (1964); *Adams v. Adams*, 262 N.C. 556, 138 S.E.2d 204 (1964); *Brown v. Brown*, 264 N.C. 485, 141 S.E.2d 875 (1965).

Cited in Kelly v. Kelly, 232 N. C. 734, 62 S. E. (2d) 55 (1950); *Livingston v. Livingston*, 235 N. C. 515, 70 S. E. (2d) 480 (1952); *Bond v. Bond*, 235 N. C. 754, 71 S. E. (2d) 53 (1952); *Feldman v. Feldman*, 236 N. C. 731, 73 S. E. (2d) 865 (1953); *Smith v. Smith*, 242 N. C. 646, 89 S. E. (2d) 255 (1955); *Workman v. Workman*, 242 N. C. 726, 89 S. E. (2d) 390 (1955); *Smith v. Smith*, 248 N. C. 298, 103 S. E. (2d) 400 (1958); *Joyner v. Joyner*, 256 N. C. 588, 124 S. E. (2d) 724 (1962); *Pickens v. Pickens*, 258 N. C. 84, 127 S. E. (2d) 889 (1962).

II. WHEN WIFE ENTITLED TO RELIEF.

Abandonment or Misconduct Constituting Cause for Divorce.—Alimony without divorce may not be awarded unless the husband separates himself from his wife and fails to provide her with the necessary subsistence according to his income and condition in life, or unless he shall be guilty of such misconduct or acts as would constitute a cause for divorce, either absolute or from bed and board. *Ipock v. Ipock*, 233 N. C. 387, 64 S. E. (2d) 283 (1951).

As grounds for relief under this section the wife must allege and prove that the husband has been guilty of misconduct or acts that would constitute cause for divorce. *Bateman v. Bateman*, 233 N. C. 357, 64 S. E. (2d) 156 (1951).

Grounds Stated in §§ 50-5, 50-7.—

In accord with original. See *Bailey v. Bailey*, 243 N. C. 412, 90 S. E. (2d) 696 (1956).

This section incorporates the indignities section of § 50-7. *Cushing v. Cushing*, 263 N.C. 181, 139 S.E.2d 217 (1964).

Plaintiff Must Meet Requirements of § 50-7.—

In accord with original. See *Schlagel v. Schlagel*, 253 N. C. 787, 117 S. E. (2d) 790 (1961).

The existence of grounds for divorce is a prerequisite to any allowance to the wife under this section. To warrant an allowance pendente lite she must allege and prove a cause of action for divorce. *Briggs v. Briggs*, 234 N. C. 450, 67 S. E. (2d) 349 (1951).

Plaintiff is not required to wait until she can maintain an action for divorce on ground of adultery before instituting an action under this section. *Cunningham v. Cunningham*, 234 N. C. 1, 65 S. E. (2d) 375 (1951).

Wrongful Abandonment by Wife.—

In accord with original. See *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

The right to subsistence pending trial in a wife's action under this section does not exist in favor of a wife who has abandoned her husband without just cause. *Reece v. Reece*, 232 N. C. 95, 59 S. E. (2d) 363 (1950).

Where the pleadings place in issue the crucial question whether the husband has separated himself from the wife, there is nothing in the language or meaning of the statute which precludes the husband from proving as a defense that in point of fact and in legal contemplation it was the wife who separated herself from the husband. *Caddell v. Caddell*, 236 N. C. 686, 73 S. E. (2d) 923 (1953).

In a wife's action for an allowance pendente lite under this section the husband is not precluded from asserting and proving as a defense to his wife's action and motion that she has separated herself from him or abandoned him. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

A wife who has abandoned her husband without just cause or who, by her wrongful conduct, has forced him to leave home,

has no right to alimony. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Unimpeached Deed of Separation Bars Alimony.—A wife who, in a valid deed of separation, has released her husband from his obligation to support is remitted to her rights under the agreement, and as long as the deed of separation stands unimpeached, the court is without power to award her alimony and counsel fees. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Where the wife sought a divorce a mensa and alimony, notwithstanding the provision of a valid separation agreement which the husband had "fully performed," she could not, after her husband had performed his part of the contract, obtain an award of alimony. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

But resumption of marital relations rescinds such deed of separation. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Effect of Decree of Divorce.—

An absolute divorce terminates the husband's legal duty to support, and he cannot thereafter be held in contempt for nonsupport even though he has contracted to provide support. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

The husband's legal duty to support his wife, unlike his contractual obligation, terminates when the marriage relationship has been terminated by a divorce a vinculo. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

A husband who has obtained a divorce cannot thereafter be required to pay alimony, nor does the divorce constitute a breach of the separation agreement the parties executed. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Answer Setting Up Defense of Adultery.—In a wife's action for alimony without divorce in which defendant's answer sets up the defense of adultery, it is error for the court to order temporary alimony to plaintiff without finding the facts with respect to the plea of adultery. *Williams v. Williams*, 230 N. C. 660, 55 S. E. (2d) 195 (1949).

Wife Not Estopped by Prior Action for Divorce Instituted by Husband.—If an action for absolute divorce is instituted and the wife is the defendant therein, she is not estopped from bringing an action for alimony without divorce during the pendency of such action. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

Evidence Sufficient to Support Judgment for Wife.—See *Bateman v. Bate-*

man, 233 N. C. 357, 64 S. E. (2d) 156 (1951).

Nonsuit held proper in action for alimony without divorce because of failure of evidence to support allegations of complaint setting forth the cause of action. *Crouse v. Crouse*, 236 N. C. 763, 73 S. E. (2d) 922 (1953).

III. JURISDICTION AND VENUE.

Section Does Not, etc.—

The wife may institute action under this section in the county in which they were living at the time of the husband's alleged abandonment. *Robbins v. Robbins*, 262 N.C. 749, 138 S.E.2d 632 (1964).

Residence Not a Condition to Maintenance of Action.—Residence is a condition to the maintenance of an action for divorce, but this is not true of an action brought under this section. *Harris v. Harris*, 257 N. C. 416, 126 S. E. (2d) 83 (1962).

Intent of Nonresident to Establish Residence Is Not Sufficient.—Intent of plaintiff, a nonresident, to establish a residence in the future in Madison County, did not authorize a trial of the suit in that county, but proper place for trial was in Haywood County, where defendant was a resident. *Burrell v. Burrell*, 243 N. C. 24, 89 S. E. (2d) 732 (1955).

Effect of Subsequent Divorce in Another State.—Where the children of the marriage are residents of this State and the parents are personally before the court, the courts of this State have jurisdiction in the wife's action for subsistence under this section to award the custody of the children to the wife and decree the amount defendant should contribute for their support, and to punish him as for contempt for wilfull failure to comply with its order, notwithstanding that the husband may have obtained a decree of divorce in another state after the entry of the order for support. *Whitford v. Whitford*, 261 N.C. 353, 134 S.E.2d 635 (1964).

IV. PLEADINGS.

The Complaint Must Be Verified.—

In accord with 2nd paragraph in original. See *Rowland v. Rowland*, 253 N. C. 328, 116 S. E. (2d) 795 (1960).

In actions brought under this section the wife is not required to file the affidavit provided in § 50-8. The verification of the complaint shall be the same as prescribed in the case of ordinary civil actions. *Cunningham v. Cunningham*, 234 N. C. 1, 65 S. E. (2d) 375 (1951).

The essential elements, etc.—

In accord with original. See *Bowling v.*

Bowling, 252 N. C. 527, 114 S. E. (2d) 228 (1960).

Where a wife elects to proceed under the first classification of causes mentioned in the statute, it suffices for her to allege and prove (1) the existence of a valid marriage between the parties, and (2) that the husband has separated himself from the wife and failed to provide her (and the children of the marriage) with necessary subsistence according to his means—or instead of the latter, that the husband is a drunkard or spendthrift. *Caddell v. Caddell*, 236 N. C. 686, 73 S. E. (2d) 923 (1953).

A wife's complaint states a cause of action for alimony without divorce under this section if it alleges separation without providing subsistence, if the husband is a drunkard or spendthrift, or "be guilty of any misconduct or acts that would be or constitute cause for divorce either absolute or from bed and board." *Thurston v. Thurston*, 256 N. C. 663, 124 S. E. (2d) 852 (1962).

To state a cause of action under this section it is necessary to allege: (1) The marriage, (2) the separation of the husband from the wife and his failure to provide the wife and children of the marriage reasonable subsistence, i.e., abandonment, or some conduct on the part of the husband constituting cause for divorce, either absolute or from bed and board, and (3) want of provocation on the part of the wife. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Section 50-10 applies to actions under this section and all allegations of the complaint are deemed denied whether actually denied by pleading or not. *Schlagel v. Schlagel*, 253 N. C. 787, 117 S. E. (2d) 790 (1961).

Plaintiff Must Meet Requirements of Statute for Divorce from Bed and Board.—

In accord with original. See *Ollis v. Ollis*, 241 N. C. 709, 86 S. E. (2d) 420 (1955); *McDowell v. McDowell*, 243 N. C. 286, 90 S. E. (2d) 544 (1955).

In an action by a wife against her husband for divorce from bed and board, she must not only set out with particularity the acts of cruelty on the part of the husband upon which she relies, but she is also required to aver, and consequently to prove, that such acts were without adequate provocation on her part. *Bateman v. Bateman*, 232 N. C. 659, 61 S. E. (2d) 909 (1950); *Ollis v. Ollis*, 241 N. C. 709, 86 S. E. (2d) 420 (1955).

But the plaintiff, in an action for alimony without divorce on the ground of abandon-

ment, is not required to allege the acts and conduct relied upon as the basis of the action with that degree of particularity as is required when the cause of action is based on such indignities to the person of plaintiff as to render her condition intolerable and life burdensome. *Sguros v. Sguros*, 252 N. C. 408, 114 S. E. (2d) 79 (1960).

In an action for alimony without divorce, allegations that the husband had been abusive and violent toward plaintiff and she had been made to fear for her safety, are insufficient, it being necessary that plaintiff allege specific acts of misconduct on the part of the husband so that the court may determine whether his conduct was in fact such as constituted cause for divorce from bed and board, and also specify what, if anything, she did or said at the time, in order that the court may determine whether she provoked the difficulty. *Ollis v. Ollis*, 241 N. C. 709, 86 S. E. (2d) 420 (1955).

Allegation That Acts of Husband Were without Provocation.—

In accord with 2nd paragraph in original. See *Ollis v. Ollis*, 241 N. C. 709, 86 S. E. (2d) 420 (1955).

In an action by the wife for alimony without divorce on the ground of mistreatment constituting constructive abandonment, the absence of an allegation that defendant's misconduct was without adequate provocation is fatal. *Barker v. Barker*, 232 N. C. 495, 61 S. E. (2d) 360 (1950).

Allegations of Adultery Taken as Controverted.—Where plaintiff did not reply and expressly deny defendant's allegations of adultery, but these allegations did not relate to a counterclaim, they were taken as controverted. *Creech v. Creech*, 256 N. C. 356, 123 S. E. (2d) 793 (1962).

Allegations Held Sufficient.—See *Ollis v. Ollis*, 241 N.C. 709, 86 S.E.2d 420 (1955).

Allegations in an action for alimony without divorce to the effect that defendant constantly mistreated plaintiff and offered such indignities to her person as to endanger her health and safety, and forced her to separate herself from defendant, that defendant drank excessively and failed to provide for her support, and that plaintiff had at all times been a dutiful wife, held sufficient to state a cause of action for alimony without divorce and defendant's demurrer thereto was properly overruled. *Bateman v. Bateman*, 232 N. C. 659, 61 S. E. (2d) 909 (1950).

Allegations to the effect that plaintiff was compelled to leave her husband by reason of his wilful failure and refusal to provide her with sufficient support and

necessary medical attention and that such wilful failure was without fault or provocation on her part, are sufficient to state a cause of action for divorce on the ground of abandonment. *McDowell v. McDowell*, 243 N. C. 286, 90 S. E. (2d) 544 (1955).

The allegation that the defendant had become an habitual drunkard constituted a ground for divorce from bed and board, § 50-7 (5), and hence was sufficient to support an action for alimony without divorce even though other insufficient allegations also appeared in the complaint. *Allen v. Allen*, 244 N. C. 446, 94 S. E. (2d) 325 (1956).

Exceptions.—Where it affirmatively appears the defendant was not permitted to offer evidence which was pertinent to the allegations of the complaint, an exception thereto will be sustained. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

V. ALLOWANCE PENDENTE LITE AND COUNSEL FEES.

A. In General.

Derivation of Right to Allowance.—See note to § 50-15.

Purpose and Amount of Allowance.—The remedy established for the subsistence of the wife pending the trial and final determination of the issues involved and for her counsel fees is intended to enable her to maintain herself according to her station in life and to have sufficient funds to employ adequate counsel to meet her husband at the trial upon substantially equal terms. In arriving at the proper amount to be allotted, the court should take into consideration all the circumstances of the family, including the separate estate of the wife and the estate and earnings of the husband, and make only such allowances as are contemplated by the statute. *Fogartie v. Fogartie*, 236 N. C. 188, 72 S. E. (2d) 226 (1952).

The granting of alimony pendente lite is given by statute for the very purpose that the wife have immediate support and be able to maintain her action. It is a matter of urgency. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Allowance of Reasonable Amount.—In an action for alimony without divorce under this section upon issuance of summons and the filing of a verified complaint setting forth facts sufficient to entitle the complaint to the relief sought, the judge of the superior court has power to require the payment by the husband of a reasonable amount for the wife's subsistence and counsel fees pendente lite. *Perkins v.*

Perkins, 232 N. C. 91, 59 S. E. (2d) 356 (1950)

Allowance as a Legal Right.—

The allowance in a proper case of subsistence and counsel fees pendente lite to the wife in an action for alimony without divorce is authorized by this section, and is so entrenched in North Carolina practice as to be considered an established legal right. *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

Section Does Not Involve an Accounting.—The provision for temporary subsistence pending the trial on the merits does not involve an accounting between husband and wife. *Harrell v. Harrell*, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

The provision for temporary subsistence pending the trial on the merits does not involve an accounting between husband and wife. It is not designed to determine property rights or to finally ascertain what alimony the wife may be entitled to in the event she prevails on the merits. Its purpose is to give her reasonable subsistence pending trial and without delay. *Harrell v. Harrell*, 256 N. C. 96, 123 S. E. (2d) 220 (1961).

Nor a Determination of Property Rights.—The provision for temporary subsistence pending the trial on the merits is not designed to determine property rights or to finally ascertain what alimony the wife may be entitled to in the event she prevails on the merits. *Harrell v. Harrell*, 253 N. C. 758, 117 S. E. (2d) 728 (1961).

The resident judge of the district has the jurisdiction to hear and determine the motion for reasonable subsistence and counsel fees pendente lite in an action for alimony without divorce. *Herndon v. Herndon*, 248 N. C. 248, 102 S. E. (2d) 862 (1958).

Motion May Be Heard Out of Term.—In an action for alimony without divorce, a motion for alimony pendente lite may be heard out of term, after five days' notice to the husband. *In re Burton*, 257 N. C. 534, 126 S. E. (2d) 581 (1962).

What Must Be Proved to Obtain Subsistence and Counsel Fees Pendente Lite.—

The provisions of this section, as amended, require as a prerequisite to the awarding of alimony pendente lite, or permanent alimony, the pendency of an action in which verified pleadings have been filed and in which the wife has alleged facts at least sufficient to meet the requirements of the statute for divorce a mensa et thoro. *Holden v. Holden*, 245 N. C. 1, 95 S. E. (2d) 118 (1956).

Complaint Must Allege Facts Constitut-

ing Cause of Action.—Alimony pendente lite and counsel fees should not be awarded unless the plaintiff alleges in her complaint facts sufficient to constitute a good cause of action under the provisions of this section. *Ipock v. Ipock*, 233 N. C. 387, 64 S. E. (2d) 283 (1951).

The existence of grounds for divorce is a prerequisite to any allowance to the wife under this section. To warrant an allowance pendente lite she must allege and prove a cause of action for divorce. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

As a prerequisite to any allowance to a wife under this section, she must show that she did not by her own conduct provoke the wrongs and abuses of which she complains. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

And Mere Institution of Suit and Allegations Are Not Enough.—A wife is not entitled to an order for support pendente lite merely because she has instituted an action and alleged grounds for divorce or alimony. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

Nor Mere Separation.—This section does not authorize the judge, in passing on a motion for alimony pendente lite, to award a wife subsistence and counsel fees merely because she and her husband have separated. *Parker v. Parker*, 261 N.C. 176, 134 S.E.2d 174 (1964).

Only Adultery Is Absolute Bar.—

In accord with original. See *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Validity of Separation, etc.—

The existence of a separation agreement is not a bar to an award of alimony pendente lite. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Finding of Facts.—

In accord with 1st paragraph in original. See *Ipock v. Ipock*, 233 N. C. 387, 64 S. E. (2d) 283 (1951).

Plaintiff was entitled to an order for subsistence pendente lite where the facts found by the judge showed that the defendant abandoned his wife, without any fault or provocation on her part, and without providing for her any maintenance and support. *Bailey v. Bailey*, 243 N. C. 412, 90 S. E. (2d) 696 (1956).

The discretion given to the trial judge is so wide that he is not required to make formal findings of fact upon a motion for alimony pendente lite unless the charge of adultery is made against the wife. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

On motion for alimony pendente lite

made in an action by the wife against the husband pursuant to this section, the judge is not required to find the facts as a basis for an award of alimony except when the adultery of the wife is pleaded in bar. Creech v. Creech, 256 N. C. 356, 123 S. E. (2d) 793 (1962); Deal v. Deal, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

And the preceding rule applies where the motion for alimony pendente lite is denied. Deal v. Deal, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

In passing on a motion for alimony pendente lite the judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the movant is entitled to the relief sought. Parker v. Parker, 261 N.C. 176, 134 S.E.2d 174 (1964).

Same—Presumption on Appeal.—

Where defendant charges that plaintiff abandoned him, it will be assumed on appeal from the denial of alimony pendente lite that the court found the facts in favor of the husband. Deal v. Deal, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

Same—When Award Based on Capacity to Earn.—To base an award on capacity to earn rather than actual earnings, there should be a finding based on evidence that the husband was failing to exercise his capacity to earn because of a disregard of his marital obligation to provide reasonable support for his wife. Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960).

Same—Ultimate Rights of Parties Not Affected.—When the facts are investigated and findings made as a guide to the court in making temporary allowances, they do not affect the ultimate rights of the parties at the final hearing. Harris v. Harris, 258 N. C. 121, 128 S. E. (2d) 123 (1962).

Power of Court to Require Disclosure of Information; Effect of Findings.—The court has jurisdiction of the parties and has plenary power and authority to require the disclosure of any information within their knowledge or available to them bearing upon a temporary allowance. It is not necessary that the parties agree as to what the husband's income is. The findings of the court will not be disturbed if based on competent evidence. Harrell v. Harrell, 256 N. C. 96, 123 S. E. (2d) 220 (1961).

The Allowance of Subsistence and Counsel Fees, etc.—

In accord with original. See Mercer v. Mercer, 253 N. C. 164, 116 S. E. (2d) 443 (1960).

The amounts allowed to a plaintiff for

subsistence pendente lite and for counsel fees are determined by the trial judge in his discretion and are not reviewable. Cunningham v. Cunningham, 234 N. C. 1, 65 S. E. (2d) 375 (1951).

The amount of the allowance for subsistence pendente lite is for the trial judge. He has full power to act without the intervention of a jury and his discretion in this respect is not reviewable, except in case of manifest abuse of discretion. Harrell v. Harrell, 253 N. C. 758, 117 S. E. (2d) 728 (1961); Harrell v. Harrell, 256 N. C. 96, 123 S. E. (2d) 220 (1961).

The amount of the allowances to plaintiff for her subsistence pendente lite and for her counsel fees is a matter for the trial judge. He has full power to act without the intervention of the jury, and his discretion in this respect is not reviewable, except in case of an abuse of discretion. The only way by which the power of the court to make these allowances can be circumvented is by allegation and proof of the wife's adultery. Fogartie v. Fogartie, 236 N. C. 188, 72 S. E. (2d) 226 (1952); Rowland v. Rowland, 253 N. C. 328, 116 S. E. (2d) 795 (1960).

Judge Must Pass on Truth or Falsity of Evidence.—When the issue has been raised as to whether the husband has separated himself from the wife, it is not sufficient that the judge merely examine the evidence or testimony to see whether there is any evidence to support plaintiff's charges or allegations which would operate as a *prima facie* showing. He must, by application of his sound judgment, pass upon its truth or falsity and find according to his conviction. Deal v. Deal, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

Discretion Is Not Absolute and Unreviewable.—

That the judge is not required to find the facts as a basis for his order for temporary subsistence of the wife, except when her adultery is alleged by the husband as a bar to her recovery, does not mean, however, that in considering a motion for alimony pendente lite, in such action, that unless the adultery of the wife is pleaded, the court may exercise an absolute and unreviewable discretion based solely upon the allegations of the complaint and the plaintiff's evidence offered in support thereof, and refuse to hear the evidence of the defendant. The judge is expected to look into the merits of the action and determine in his sound legal discretion, after considering the allegations of the complaint and the evidence of the respective parties, whether or not the

movant is entitled to the relief sought. *Ipock v. Ipock*, 233 N. C. 387, 64 S. E. (2d) 283 (1951).

Either Party, etc.—

An order for subsistence pendente lite may be modified at any time before the trial on application of either party. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

Effect of 1953 Amendment.—Where, after the wife instituted a suit for alimony without divorce, in which action the question of the custody of the minor child of the marriage was not raised, the husband instituted suit for absolute divorce, it was held that the 1953 amendment to this section did not affect the jurisdictional power of the court to award subsistence for the mother and child pendente lite in her action. *Barnwell v. Barnwell*, 241 N. C. 565, 85 S. E. (2d) 916 (1955).

Order Cannot Set Up Savings Account.—A pendente lite order is intended to go no further than provide subsistence and counsel fees pending the litigation. It cannot set up a savings account in favor of the plaintiff. *Sguros v. Sguros*, 252 N. C. 408, 114 S. E. (2d) 79 (1960).

Order Entered without Notice to Defendant Is Void.—An order entered in the wife's action for alimony without divorce requiring defendant to pay subsistence and counsel fees pendente lite is void when the order is entered without notice to defendant. *Barnwell v. Barnwell*, 241 N. C. 565, 85 S. E. (2d) 916 (1955).

An order allowing alimony pendente lite without notice is void. *In re Burton*, 257 N. C. 534, 126 S. E. (2d) 581 (1962).

B. Counsel Fees.

The purpose of the allowance for attorney's fees is to put the wife on substantially even terms with the husband in the litigation. *Harrell v. Harrell*, 253 N. C. 758, 117 S. E. (2d) 728 (1961); *Harrell v. Harrell*, 256 N. C. 96, 123 S. E. (2d) 220 (1961); *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

And even though the court denied the wife's motion for alimony pendente lite, the court could properly allow counsel fees to the wife's attorney in order that she could have adequate means to meet her husband at the trial upon substantially even terms. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

Adultery Does Not Bar Allowance of Counsel Fees.—A plea of adultery, found by the court to be true, does not preclude the court from allowing the wife reasonable counsel fees for the prosecution or defense of an action for divorce. *Bolin*

v. *Bolin*, 242 N. C. 642, 89 S. E. (2d) 303 (1955).

Court May Enter Second Order, etc.—

Under proper circumstances the court, in its sound discretion, may in an action for alimony without divorce enter a second order allowing additional counsel fees. *Yow v. Yow*, 243 N. C. 79, 89 S. E. (2d) 867 (1955).

VI. THE ORDER AND ENFORCEMENT THEREOF.

A. In General.

No Final Judgment, etc.—

An order entered under this section is not a final determination and does not affect the final rights of the parties. *Deal v. Deal*, 259 N. C. 489, 131 S. E. (2d) 24 (1963).

Presumption.—When the judge, after hearing the evidence upon a motion for temporary alimony in an action instituted under this section, either makes an award of alimony or declines to make one, it is presumed that he found the facts from the evidence presented to him according to his convictions about the matter and that he resolved the crucial issues in favor of the party who prevailed on the motion. *Williams v. Williams*, 261 N.C. 48, 134 S.E.2d 227 (1964).

Final Order Terminates Order for Subsistence Pendente Lite.—Ordinarily, a final order for alimony without divorce terminates an order for subsistence pendente lite. *Harris v. Harris*, 258 N. C. 121, 128 S. E. (2d) 123 (1962).

But Relief Ordered at Previous Hearing May Be Continued as Permanent Alimony.

—When the court on the final hearing finds facts based on the defendant's admissions and his testimony given at the hearing, the court may determine that the relief sought by plaintiff and ordered at a previous hearing should be continued as permanent alimony, subject to the further orders of the court. *Harris v. Harris*, 258 N. C. 121, 128 S. E. (2d) 123 (1962).

Modification or Vacatin of Order.—

The allowance is subject to modification from time to time. *Harrell v. Harrell*, 256 N. C. 96, 123 S. E. (2d) 220 (1961).

A change of condition and circumstances must be established before an order for the support of children and permanent alimony can be modified. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

But an order for subsistence pendente lite may be modified at any time before trial on application of either party without a finding of a material change of condition.

Snuggs v. Snuggs, 260 N.C. 533, 133 S.E.2d 174 (1963).

An order awarding the custody of minor children determines the present rights of the parties but is not permanent in nature and is subject to modification for subsequent change of circumstance affecting the welfare of the children, and therefore an order of the court, entered pursuant to this section, awarding the custody of the children to the wife did not preclude another judge of the superior court from awarding custody of the children to the husband in the wife's later action for absolute divorce under § 50-6. *Thomas v. Thomas*, 259 N.C. 461, 130 S.E. (2d) 871 (1963).

Divorce Decree Does Not Affect Prior Order for Alimony.—

A judgment for absolute divorce does not invalidate a judgment for alimony without divorce entered before the action for absolute divorce was instituted. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E. (2d) 857 (1962).

A decree of absolute divorce will neither impair husband's liability for alimony under a former judgment for permanent alimony under this section nor affect the power of the court to enforce it by contempt proceedings or otherwise. *Wilson v. Wilson*, 260 N.C. 347, 132 S.E.2d 695 (1963).

Judgment Constitutes Judicial Separation for Purpose of § 50-6.—A judgment in an action instituted under this section decreeing that the husband has willfully abandoned the wife and awarding her support and maintenance constitutes a judicial separation which, two years thereafter, will permit the husband to obtain an absolute divorce. *Rouse v. Rouse*, 258 N.C. 520, 128 S.E. (2d) 865 (1963).

B. Amount of Allowance.

Discretion of Judge.—

The amount of the allowance is a matter for the trial judge. *Deal v. Deal*, 259 N.C. 489, 131 S.E. (2d) 24 (1963).

The amount of alimony to be allowed pursuant to the provisions of this section is within the sound discretion of the trial court and its order will not be disturbed unless there has been an abuse of discretion. *Harris v. Harris*, 258 N.C. 121, 128 S.E. (2d) 123 (1962).

The amount of alimony allowable pendente lite is a matter of sound judicial discretion having regard to the condition and circumstances of the parties and the current earnings of the husband. *Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964).

The amount of the defendant is required to

pay for the support of his child and for reasonable subsistence of the plaintiff pendente lite and for compensation to her counsel, is determinable by the judge in the exercise of his sound discretion, and in the absence of an abuse of discretion, his decision is not reviewable. *Rock v. Rock*, 260 N.C. 223, 132 S.E.2d 342 (1963).

Election to Seek Alimony Rather Than Damages for Breach of Contract to Support.—When a wife, in an action for alimony without divorce, elects to seek alimony rather than damages for the breach of the contract to support her, she is only entitled to such an award as would be proper if no contract had been signed. If there has been a partial performance, she must account for the net benefits, if any, which she may have received. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

The award should be based on the amount which defendant is earning when alimony is sought and the award made, if the husband is honestly engaged in a business to which he is properly adapted and is in fact seeking to operate his business profitably. *Conrad v. Conrad*, 252 N.C. 412, 113 S.E. (2d) 912 (1960).

Amount of Award Not Dependent on Earnings of Husband.—The granting of an allowance and the amount thereof does not necessarily depend upon the earnings of the husband. One who has no income, but is able-bodied and capable of earning, may be ordered to pay subsistence. *Harrell v. Harrell*, 253 N.C. 758, 117 S.E. (2d) 728 (1961); *Harrell v. Harrell*, 256 N.C. 96, 123 S.E. (2d) 220 (1961).

Nor Wife's Ability to Support Herself.—The duty of support resting on the husband does not depend on the adequacy or inadequacy of the wife's means or on the ability or inability of the wife to support herself by her own labor or out of her own separate property. The fact that the wife has property or means of her own does not relieve the husband of his duty to furnish her reasonable support according to his ability. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E. (2d) 228 (1960); *Mercer v. Mercer*, 253 N.C. 164, 116 S.E. (2d) 443 (1960).

But the earnings and means of the wife are matters to be considered by the judge in determining the amount of alimony. *Bowling v. Bowling*, 252 N.C. 527, 114 S.E. (2d) 228 (1960).

Limitation in § 50-14, etc.—

The limitation imposed by § 50-14 is not applicable when plaintiff seeks alimony pendente lite or without divorce, but the limitation there expressed ought not to be

completely ignored when the court is called upon to make an award as provided by this section. Conrad v. Conrad, 252 N. C. 412, 113 S. E. (2d) 912 (1960).

Except when the allowance is made following a decree of divorce a mensa et thoro, the court, in making the allowance, is not confined to a one-third part of the defendant's net annual income. Harris v. Harris, 258 N. C. 121, 128 S. E. (2d) 123 (1962).

C. Enforcement.

Wife may compel performance by judicial decree where husband separates himself from his wife and fails to support her. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

A husband cannot, by merely providing support for his wife until he gets beyond the jurisdiction of the court, deprive his wife of the right of compelling the husband by judicial decree to support her. Wilson v. Wilson, 261 N.C. 40, 134 S.E.2d 240 (1964).

Limit of Court's Authority.—When a court awards alimony pendente lite, it has authority "to cause the husband to secure so much of his estate" as may be necessary to comply with its order. Such order as may be necessary for the protection of the wife is the limit of the court's authority. It cannot penalize defendant unless and until he refuses to comply with the court's direction. Harris v. Harris, 257 N. C. 416, 126 S. E. (2d) 83 (1962).

Contempt in Failure to Comply with Consent Judgment.—

Although a judgment may be entered by consent, based on a written agreement, if such judgment orders and decrees that the husband shall pay certain sums as alimony for the support of his wife, a willful refusal to make the payments as directed therein will subject the husband to a proper proceeding to attachment for contempt. Stancil v. Stancil, 255 N. C. 507, 121 S. E. (2d) 882 (1961).

Husband's Interest in Estate by Entireties Chargeable.—

In accord with original. See Porter v. Citizens Bank of Warrenton, Inc., 251 N. C. 573, 111 S. E. (2d) 904 (1960).

But Sale of Such Estate May Not be Ordered.—The court does not have the power to order the sale of land held as tenants by the entireties to procure funds to pay alimony to the wife or to pay her counsel fees. Porter v. Citizens Bank of Warrenton, Inc., 251 N. C. 573, 111 S. E. (2d) 904 (1960).

Attachment Will Lie.—

A proper order for reasonable subsist-

ence and counsel fees pendente lite may be enforced against a nonresident or absconding husband by attachment against his property without notice, and in such case may also appoint a receiver to collect the income from the husband's property. Perkins v. Perkins, 232 N. C. 91, 59 S. E. (2d) 356 (1950).

Writ of Possession. — To enforce an order allowing alimony and counsel fees pursuant to the provisions of this section, the court may issue a writ of possession pursuant to the provisions of § 50-17, giving the wife possession of property held by her and her husband as tenants by the entireties, in order that she may apply the rents and profits therefrom, as they shall accrue and become personalty, to the payment of alimony and counsel fees as fixed by the court. Porter v. Citizens Bank of Warrenton, Inc., 251 N. C. 573, 111 S. E. (2d) 904 (1960).

The court may allow plaintiff possession of the home owned by the parties as tenants by the entireties in fixing alimony pendente lite under this section. Sellars v. Sellars, 240 N. C. 475, 82 S. E. (2d) 330 (1954).

Receiver May Collect Income from Husband's Realty to Pay Alimony.—In a wife's action for alimony without divorce, a receiver appointed therein to take possession of the husband's property within the State may collect the income from the husband's realty for the purpose of paying alimony awarded the wife in the action and may sell the husband's real estate if necessary to pay the alimony decreed. Lambeth v. Lambeth, 249 N. C. 315, 106 S. E. (2d) 491 (1959).

Non-Income-Producing Realty May Be Sold and Proceeds Invested.—A judge of the superior court has the power to order the sale of a husband's non-income-producing real estate for the purpose of investing the proceeds derived from such sale in legal investments as provided in article 6 of chapter 53, so as to produce an income sufficient to enable the receiver appointed to enforce payment of alimony decreed to pay the expenses of the receivership and alimony awarded the plaintiff wife. Lambeth v. Lambeth, 249 N. C. 315, 106 S. E. (2d) 491 (1959).

Priority of Wife's Claim.—

An order was entered in a divorce cause to the effect that if a deed of trust on property held by the husband and wife by the entireties were foreclosed, the husband's share of the surplus should be secured for the payment of the alimony awarded. The deed of trust was foreclosed and the trustee voluntarily paid in the office of the

clerk the surplus realized in the sale. In an action on account instituted by a creditor of the husband prior to the sale, a warrant of attachment was issued and the husband's share in the surplus attached on the date it was put in the hands of the clerk. It was held that there having been no attachment of the funds in the divorce action, nor the surplus placed in custodia legis in that action, and the orders issued therein not constituting a lien in futuro upon such funds, the lien of the attaching creditor is superior to the rights of the wife therein. *Porter v. Citizens Bank of Warrenton, Inc.*, 251 N. C. 573, 111 S. E. (2d) 904 (1960).

Imprisonment.—A willful failure of the husband to comply with the court's order to pay to the wife the amount fixed by order of the court, having due regard to the situation of the parties, the ability of the husband to pay, and the needs of the wife is a contempt, and can be punished as such by imprisonment and is not within the constitutional inhibition against imprisonment for debt. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

VII. CUSTODY AND SUPPORT OF CHILDREN.

Section Creates Additional Method of Determining Custody.—The 1953 amendment of this section, granting jurisdiction to determine custody in an action for alimony without divorce, creates an additional method whereby the matter of custody may be determined. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

Prior to 1953, custody of children could not be determined in a proceeding under this section. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

The amendment of 1953 provided for determination of custody of children in lieu of habeas corpus. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Which Is Incidental to Action for Alimony without Divorce.—A controversy concerning child custody and support accompanies, is collaterally connected with, and is incidental to, an action for divorce or for alimony without divorce, but may not be determined under § 50-13 and this section when it is the only cause of action alleged, except in those special and unusual circumstances provided for in the second paragraph of § 50-13. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

An action for custody of and support for children of a marriage may not be maintained under this section in the ab-

sence of a claim, upon proper allegations, of alimony by the wife. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

The amendments of 1953 and 1955 mean that when a wife has instituted an action upon proper allegations for alimony without divorce, she may in the original complaint, or either party may by motion in the cause, seek and thereby obtain a determination of the custody of the children of the marriage and an order for the support of such children, even if it be determined that the wife is not entitled to alimony. *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964).

Custody Jurisdiction Is Concurrent.—If an action for divorce from bed and board is equivalent to an action for alimony without divorce, it would seem that the custody jurisdiction conferred in both actions would be concurrent in the absence of specific language to the contrary in the statute. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

But Court First Obtaining Jurisdiction Retains Cause.—The first paragraph of the 1955 amendment, c. 1189, applies only to the support and maintenance of a child or children whose custody was adjudicated under a proceeding instituted pursuant to the provisions of this section as amended. Therefore, the court first obtaining jurisdiction of the parties would retain the cause. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

A decree of absolute divorce does not oust the jurisdiction of the court in a prior action under this section over the children of the marriage or affect the recovery of alimony pendente lite accruing prior to the date of the entry of the decree for absolute divorce, and an order entered in the court rendering the decree for absolute divorce respecting the custody of the children of the marriage is erroneous. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

If an action for absolute divorce is instituted and the custody of children born of the marriage is prayed for therein, the wife is not estopped from bringing an action under this section during the pendency of such action; however, she could not have the custody of the children born of the marriage adjudicated in the second action. Jurisdiction of the matters relating to custody having been invoked theretofore in the action for divorce, the court in which the divorce action was pending would have exclusive jurisdiction over the question of custody. *Blankenship v. Blankenship*, 256 N. C. 638, 124 S. E. (2d) 857 (1962).

Factors to Be Considered.—In provid-

ing for the support of minor children the ability of the father to pay, as well as the needs of the children, must be taken into consideration by the court. *Martin v. Martin*, 263 N.C. 86, 138 S.E.2d 801 (1964).

Award of Custody and Child Support after Denial of Actions for Divorce and Alimony.—After plaintiff's suit for divorce from bed and board and defendant's cross action for alimony without divorce had both been denied, the superior court judge had jurisdiction and power to enter the

portion of the judgment awarding custody of the minor son of the parties to defendant and providing for his maintenance and support. *Bunn v. Bunn*, 258 N.C. 445, 128 S.E. (2d) 792 (1963).

Decrees Subject to Further Orders of Court.—All decrees with respect to custody and support of minor children are subject to the further orders of the court. *Blankenship v. Blankenship*, 256 N.C. 638, 124 S.E. (2d) 857 (1962).

§ 50-17. Alimony in real estate, writ of possession issued.

Cross Reference.—

See note under § 50-16, analysis line VI, C.

§ 50-18. Residence of military personnel; payment of defendant's travel expenses by plaintiff.—In any action instituted and prosecuted under this chapter, allegation and proof that the plaintiff or the defendant has resided or been stationed at a United States army, navy, marine corps, coast guard or air force installation or reservation or any other location pursuant to military duty within this State for a period of six months next preceding the institution of the action shall constitute compliance with the residence requirements set forth in this chapter; provided that personal service is had upon the defendant or service is accepted by the defendant, within or without the State as by law provided.

Upon request of the defendant or attorney for the defendant, the court may order the plaintiff to pay necessary travel expenses from defendant's home to the site of the court in order that the defendant may appear in person to defend said action. (1959, c. 1058.)

Editor's Note.—For note concerning residence requirement for servicemen, see 40 N.C. Law Rev. 343.

This section is an expression of policy by the General Assembly that a serviceman stationed on a military reservation in the State is capable of establishing his domicile

in North Carolina. The statute removes the barriers which might prevent a serviceman so situated from establishing a legal residence in this State where he actually has the present intention of changing his domicile to this State. *Martin v. Martin*, 253 N.C. 704, 118 S.E. (2d) 29 (1961).

Chapter 51.

Marriage.

Article 2.

Marriage Licenses.

Sec.

51-18.1. Correction of errors in names in application or license.

Sec.

51-21. Issuance of delayed marriage certificates.

ARTICLE 1.

General Provisions.

§ 51-1. Requisites of marriage; solemnization.—The consent of a male and female person who may lawfully marry, presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, and in the presence of an ordained minister of any religious denomination, minister authorized by his church, or of a justice of the peace, and the consequent declaration by such minister or officer that such persons are man and wife,

shall be a valid and sufficient marriage: Provided, that the rite of marriage among the Society of Friends, according to a form and custom peculiar to themselves, shall not be interfered with by the provisions of this chapter: Provided further, that marriages solemnized and witnessed by a local spiritual assembly of the Baha'is, according to the usage of their religious community, shall be valid; provided further, marriages solemnized before March 9, 1909, by ministers of the gospel licensed, but not ordained, are validated from their consummation. No justice of the peace who holds the office of register of deeds shall, while holding said office, perform any marriage ceremony. (1871-2, c. 193, s. 3; Code, s. 1812; Rev., s. 2081; 1908, c. 47; 1909, c. 704, s. 2; c. 897; C. S., s. 2493; 1945, c. 839; 1965, c. 152.)

Local Modification.—Bertie: 1951, c. 852.

Editor's Note.—

The 1965 amendment added the second proviso.

Cited in Western Conference of Original Free Will Baptists of North Carolina v. Creech, 256 N. C. 128, 123 S. E. (2d) 619 (1962).

§ 51-2. Capacity to marry.—All unmarried persons of eighteen years, or upwards, of age, may lawfully marry, except as hereinafter forbidden: Provided, that persons over sixteen years of age and under eighteen years of age may marry under a special license to be issued by the register of deeds, which said special license shall only be issued after there shall have been filed with the register of deeds a written consent to such marriage, signed by one of the parents of any such person or signed by the person standing in loco parentis to such male or female, and the fact of the filing of such written consent shall be set out in said special license: Provided, that when the special license is procured by fraud and misrepresentation, the parent or person standing in loco parentis of the male or female shall be a proper party plaintiff in an action to annul said marriage. When an unmarried female between the ages of twelve and sixteen is pregnant or has given birth to a child and such unmarried female and the putative father of her child, either born or unborn, shall agree to marry and consent in writing to such marriage is given by one of the parents of the female, or by that person standing in loco parentis to such female, or by the guardian of the person of such female, or by the director of public welfare of the county of residence of either party, such written consent shall be sufficient authorization for the register of deeds to issue a special license to marry. All couples resident of the State of North Carolina who marry in another state must file a copy of their marriage certificate in the office of the register of deeds of the home county of the groom within thirty days from the date of their return to the State, as residents, which certificate shall be indexed on the marriage license record of the office of the register of deeds and filed with the marriage license in his office; the fee for the filing and indexing said certificate shall be fifty cents: Provided, the failure to file said certificate shall not invalidate the marriage. (R. C., c. 68, s. 14; 1871-2, c. 193; Code, s. 1809; Rev., s. 2082; C. S., s. 2494; 1923, c. 75; 1933, c. 269, s. 1; 1939, c. 375; 1947, c. 383, s. 2; 1961, c. 186.)

Editor's Note.—

The 1961 amendment substituted "di- rector" for "superintendent" in line seventeen.

§ 51-3. Want of capacity; void and voidable marriages.—All marriages between a white person and a negro or between a white person and person of negro descent to the third generation, inclusive, or between a Cherokee Indian of Robeson County and a negro, or between a Cherokee Indian of Robeson County and a person of negro descent to the third generation, inclusive, or between any two persons nearer of kin than first cousins, or between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, or between persons either of whom has a husband or wife living at the time of such marriage, or between persons either of whom is at the time physically impotent, or is incapable of contracting from want of will or understanding, shall be void: Provided, double first cousins

may not marry; and provided further, that no marriage followed by cohabitation and the birth of issue shall be declared void after the death of either of the parties for any of the causes stated in this section, except for that one of the parties was a white person and the other a negro or of negro descent to the third generation, inclusive, and for bigamy; provided further, that no marriage by persons either of whom may be under sixteen years of age, and otherwise competent to marry, shall be declared void when the girl shall be pregnant, or when a child shall have been born to the parties unless such child at the time of the action to annul shall be dead. A marriage contracted under a representation and belief that the female partner to the marriage is pregnant, followed by the separation of the parties within forty-five (45) days of the marriage which separation has been continuous for a period of one year shall be voidable: Provided, that no child shall have been born to the parties within ten (10) lunar months of the date of separation. (R. C., c. 68, ss. 7, 8, 9; 1871-2, c. 193, s. 2; Code, s. 1810; 1887, c. 245; Rev., s. 2083; 1911, c. 215, s. 2; 1913, c. 123; 1917, c. 135; C. S., 2495; 1947, c. 383, s. 3; 1949, c. 1022; 1953, c. 1105; 1961, c. 367.)

Editor's Note.—

The 1953 amendment added at the end of the section the provision as to a marriage contracted under the representation and belief that the female is pregnant.

The 1961 amendment deleted the words "or Indian" formerly appearing after the word "negro" four places in the section.

For brief comment on the 1953 amendment, see 31 N. C. Law Rev. 412.

Marriage of a party under the minimum age, etc.—

Although this section provides that all marriages "between a male person under sixteen years of age and any female, or between a female person under sixteen years of age and any male, . . . shall be void," it is well established that such marriages are voidable rather than void. This was the rule of the common law. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

A marriage which is not void, *ab initio*, but merely voidable, because one of the parties thereto was at its date under the age at which he or she might lawfully marry, may be ratified by the subsequent conduct of the parties in recognition of the marriage. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

Marriage of Person Incapable of Understanding Is Not Void *Ipsa Facto*.—Under the rule of the common law as modified by statute, the marriage of a person incapable of contracting for want of understanding is not void *ipso facto*; but, if and when declared void in a legally constituted action, such marriage is void *ab initio*. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

What Constitutes Mental Capacity.—Knowledge of the provisions of the statutory law relating to the revocation of a will by marriage and relating to the per-

sons who shall succeed to the estate of an intestate is not a prerequisite or necessary element of mental capacity sufficient to contract a valid marriage. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

When Such Marriage Not Voidable.—A marriage of a person incapable of contracting for want of understanding, when followed by cohabitation and the birth of issue, may not be declared void after the death of either of the parties. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

Second Proviso Does Not Apply When Marriage Not Followed by Birth of Issue.

—Where the marriage of a person incapable of contracting for want of understanding was followed by cohabitation but not by birth of issue, the second proviso of this section does not apply. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

Nor Does It Apply to Bigamous Marriage.—The second proviso of this section does not apply to bigamous marriages. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

Marriage of Persons Nearer of Kin Than First Cousins.—In *Baity v. Cranfill*, 91 N. C. 293 (1884), it was held that the authority conferred upon the court by § 50-4 was so limited by the second proviso of this section as to deprive the court of the power to declare void the marriage of uncle and niece, "nearer of kin than first cousins," after the husband's death, when their marriage was followed by cohabitation and the birth of issue. *Ivery v. Ivery*, 258 N. C. 721, 129 S. E. (2d) 457 (1963).

An annulment decree rendered when children of the marriage are living is contrary to this section and improvidently entered *Scarboro v. Morgan*, 233 N. C. 449, 64 S. E. (2d) 422 (1951).

ARTICLE 2.

Marriage Licenses.

§ 51-6. Solemnization without license unlawful.—No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, until there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place or by his lawful deputy. (1871-2, c. 193, s. 4; Code, s. 1813; Rev., s. 2086; C. S., s. 2498; 1957, c. 1261; 1959, c. 338.)

Editor's Note.—The 1957 amendment inserted in the last two lines the words "or the county of residence of either of the two persons to be married." The 1959 amendment deleted the words "or the county of residence of either of inserted by the 1957 amendment.

§ 51-7. Penalty for solemnizing without license.—Every minister or officer who marries any couple without a license being first delivered to him, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within thirty days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two hundred dollars to any person who sues therefor, and he shall also be guilty of a misdemeanor. (R. C., c. 68, ss. 6, 13; 1871-2, c. 193, s. 8, Code, s. 1817; Rev., ss. 2087, 3372; C. S., s. 2499; 1953, c. 638, s. 1.)

Editor's Note. — The 1953 amendment, "thirty days" for "two months" in line effective January 1, 1954, substituted four.

§ 51-8. License issued by register of deeds.—Every register of deeds shall, upon application, issue a license for the marriage of any two persons, if it appears to him probable that there is no legal impediment to such marriage. Where either party to the proposed marriage is under eighteen years of age, and resides with the father, or mother, or uncle, or aunt, or brother, or elder sister, or resides at a school, or is an orphan and resides with a guardian, the register shall not issue a license for such marriage until the consent in writing of the relation with whom such infant resides, or, if he or she resides at a school, of the person by whom said infant was placed at school, and under whose custody and control he or she is, is delivered to him, and such written consent shall be filed and preserved by the register. When it appears to the register of deeds that either party to the proposed marriage may be under eighteen years of age, such register of deeds shall have the authority to require such party to present a certified copy of his or her birth certificate, or a certified copy of his or her birth record in the form of a birth registration card as provided in G. S. 130-102, which shall be filed with the application for a license. When it appears to the register of deeds that it is probable there is a legal impediment to the marriage of any person for whom a license is applied, he has power to administer to the person so applying an oath touching the legal capacity of said parties to contract a marriage. (1871-2, c. 193, s. 5; Code, s. 1814; 1887, c. 331; Rev., s. 2088; C. S., s. 2500; 1957, c. 506, s. 1.)

Editor's Note.—The 1957 amendment inserted the next to last sentence.

§ 51-8.1. Nonresidents required to apply for license forty-eight hours before issuance.—No marriage license shall be issued by any register of deeds for the marriage of any two persons, both of whom are nonresidents of the State of North Carolina, unless application for such license has been on file in the office of the register of deeds issuing the license for at least forty-eight hours. Such application must be made in writing and filed subject to public inspection in the office of the register of deeds to which the application is made and shall give the names of the parties to the marriage, their race, ages, and residence addresses. For

receiving and filing such application, the register of deeds shall collect a fee of fifty cents (50c).

Any register of deeds who knowingly or without reasonable inquiry, personally or by his deputy, violates any of the provisions of this section shall forfeit and pay two hundred dollars (\$200.00) to any parent, guardian, or other person standing in loco parentis, who sues for the same.

This section shall only apply to Pamlico county. (1945, cc. 1046, 1103; 1947, cc. 288, 289, 391, 538; 1949, cc. 13, 62, 329; 1951, c. 907, s. 1.)

Editor's Note.—

Prior to the 1951 amendment this section also applied to Bertie county.

§ 51-9. Health certificates required of applicants for licenses.

And, furthermore, such certificate shall state that, by the usual methods of examination made by a regularly licensed physician, the applicant was found to be not subject to uncontrolled epileptic attacks, an idiot, an imbecile, a mental defective, or of unsound mind. (1939, c. 314, s. 1; 1941, c. 218, s. 1; 1945, c. 577, s. 1; 1947, c. 929; 1955, c. 484.)

Editor's Note.—The 1955 amendment inserted the word "uncontrolled" in line three of the last paragraph. As the rest of the section was not changed by the amendment it is not set out.

§ 51-10. Exceptions to § 51-9.—(a) Exceptions to § 51-9, in case of persons who have been infected with a venereal disease, are permissible only under the following conditions:

- (1) When the applicant has completed treatment and is certified by a regularly licensed physician as having been cured or probated, and when said physician has certified that he has informed both the applicant and the proposed marital partner of any possible future infectivity of the applicant,
- (2) When the applicant is found to be in that stage of such disease that is not communicable to the marital partner as certified by a regularly licensed physician, provided that the applicant signs an agreement to take adequate treatment until cured or probated,
- (3) When the applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that the applicant signs an agreement to take adequate treatment until cured or probated,
- (4) When the applicant and the proposed marital partner are both infected with the same disease and have signed an agreement to take treatment until cured or probated.

(b) Exceptions to § 51-9, in case of persons who have active tuberculosis, are permissible only under the following conditions:

- (1) When the female applicant is pregnant and it is necessary to protect the legitimacy of the offspring, provided that such applicant (and the proposed marriageable partner if he has active tuberculosis) shows evidence of being under treatment for tuberculosis and both persons are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.
- (2) When there is a living child of the parties and it is necessary to protect the legitimacy of said child and either or both of the parties have active tuberculosis, provided that such party or parties with active tuberculosis show evidence of being under treatment for tuberculosis and both parties are known to the local or county health department and sign agreements to take adequate treatment until cured or protected.
- (3) To validate any type of marriage which took place prior to the illness of either applicant but which marriage was later found to be invalid

because of some technicality and said technicality is not a bar to marriage in North Carolina, provided the marital partner or partners who have active tuberculosis show evidence of being under treatment and sign an agreement to take adequate treatment until cured or protected, and both marital partners are known to the local or county health department. (1939, c. 314, s. 2; 1945, c. 577, s. 2; 1959, c. 351.)

Editor's Note.—

The 1959 amendment added subsection (b).

§ 51-11. Who may execute certificate; form; filing copy with Department of Health.—Such certificate, upon the basis of which license to marry is granted, shall be executed by any reputable physician licensed to practice in the State of North Carolina, whose duty it shall be to examine such applicants and to issue such certificate in conformity with the requirements of §§ 51-9 to 51-14. If applicants are unable to pay for such examination, certificate without charge may be obtained from the local health director or county physician.

Such certificate form shall be designed by the State Board of Health and shall be obtained by the register of deeds from the State Board of Health upon request.

Every examining physician under the provisions of §§ 51-9 to 51-14 shall make and immediately file with the Department of Health of North Carolina a true copy of such certificate. (1939, c. 314, s. 3; 1957, c. 1357, s. 10.)

Editor's Note.—The 1957 amendment, "health director" for "local health officer" effective January 1, 1958, substituted "local" in line six.

§ 51-14. Compliance with requirement by residents who marry outside the State.

Effect of Noncompliance.—Failure to file a health certificate as required by law does not invalidate an otherwise legal marriage; but such failure to comply with the statute in this respect, if true, does

make the parties subject to indictment, and, if they are convicted, to the penalty or penalties provided for the violation of this section. *Hall v. Hall*, 250 N. C. 275, 108 S. E. (2d) 487 (1959).

§ 51-16. Form of license.—License shall be in the following or some equivalent form:

To any ordained minister of any religious denomination, minister authorized by his church, or to any justice of the peace for county: A. B. having applied to me for a license for the marriage of C. D. (the name of the man to be written in full) of (here state his residence), aged years (race, as the case may be), the son of (here state the father and mother, if known; state whether they are living or dead, and their residence, if known; if any of these facts are not known, so state), and E. F. (write the name of the woman in full) of (here state her residence), aged years (race, as the case may be), the daughter of (here state names and residences of the parents, if known, as is required above with respect to the man). (If either of the parties is under eighteen years of age, the license shall here contain the following:) And the written consent of G. H., father (or mother, etc., as the case may be) to the proposed marriage having been filed with me, and there being no legal impediment to such marriage known to me, you are hereby authorized, at any time within sixty days from the date hereof, to celebrate the proposed marriage at any place within the said county. You are required, within thirty days after you shall have celebrated such marriage, to return this license to me at my office with your signature subscribed to the certificate under this license, and with the blanks therein filled according to the facts, under penalty of forfeiting two hundred dollars to the use of any person who shall sue for the same.

Issued this day of, 19...

L. M.,

Register of Deeds of County

Every register of deeds shall designate in every marriage license issued the race of the persons proposing to marry by inserting in the blank after the word "race" the words "white," "colored," or "indian," as the case may be. The certificate shall be filled up and signed by the minister or officer celebrating the marriage, and also be signed by one or more witnesses present at the marriage, who shall add to their names their place of residence, as follows:

I, N. O., an ordained or authorized minister of (here state to what religious denomination, or justice of the peace, as the case may be), united in matrimony (here name the parties), the parties licensed above, on the day of, 19..., at the house of P. R., in (here name the town, if any, the township and county), according to law.

..... N. O.

Witness present at the marriage:

S. T., of (here give residence).

(1871-2, c. 193, s. 6; Code, s. 1815; 1899, c. 541, ss. 1, 2; Rev., s. 2089; 1909, c. 704, s. 3; 1917, c. 38; C. S., s. 2502; 1953, c. 638, s. 2.)

Editor's Note. — The 1953 amendment, time for returning the license from sixty effective January 1, 1954, changed the to thirty days.

§ 51-17. Penalty for issuing license unlawfully.—Every register of deeds who knowingly or without reasonable inquiry, personally or by deputy, issues a license for the marriage of any two persons to which there is any lawful impediment, or where either of the persons is under the age of eighteen years, without the consent required by law, shall forfeit and pay two hundred dollars to any parent, guardian, or other person standing in loco parentis, who sues for the same: Provided, that requiring a party to a proposed marriage to present a certified copy of his or her birth certificate, or a certified copy of his or her birth record in the form of a birth registration card as provided in G. S. 130-102, in accordance with the provisions of G. S. 51-8, shall be considered a reasonable inquiry into the matter of the age of such party. (R. C., c. 68, s. 13; 1871-2, c. 193, s. 7; Code, s. 1816; 1895, c. 387; 1901, c. 722; Rev., s. 2090; C. S., s. 2503; 1957, c. 506, s. 2.)

Editor's Note.—

The 1957 amendment added the proviso.

§ 51-18. Record of licenses and returns; originals filed.—Every register of deeds shall keep a book (which shall be furnished on demand by the board of county commissioners of his county) on the first page of which shall be written or printed:

Record of marriage licenses and of returns thereto, for the county of, from the day of, 19...., to the day of, 19...., both inclusive.

In said book shall be entered alphabetically, according to the names of the proposed husbands, the substance of each marriage license and the return thereupon, as follows: The book shall be divided by lines with columns which shall be properly headed, and in the first of these, beginning on the left, shall be put the date of issue of the license; in the second, the name in full of the intended husband, with his residence; in the third, his age; in the fourth, his race and color; in the fifth, the name in full of the intended wife, with her residence; in the sixth, her age; in the seventh, her race and color; in the eighth, the name and title of the minister or officer who celebrated the marriage; in the ninth, the day of the celebration; in the tenth, the place of the celebration; in the eleventh, the names of all or at least two of the witnesses who signed the return as present at the celebration. The original license and return thereto shall be filed and preserved.

(1871-2, c. 193, s. 9; Code, s. 1818; 1899, c. 541, s. 3; Rev., s. 2091; C. S., s. 2504; 1963, c. 429.)

Editor's Note. — The 1963 amendment substituted "two" for "three" near the end of the last paragraph.

§ 51-18.1. Correction of errors in names in application or license.— When it shall appear to the register of deeds of any county in this State that the name of either or both parties to a marriage is incorrectly stated on an application for a marriage license, or upon a marriage license issued thereunder, or upon a return or certificate of an officiating officer, the register of deeds is authorized to correct such record or records to show the true name or names of the parties to the marriage upon being furnished with an affidavit signed by one or both of the applicants for the marriage license, accompanied by affidavits of at least two other persons who know the true name or names of the person or persons seeking such correction. (1953, c. 797; 1959, c. 344.)

Editor's Note. — The 1959 amendment immediately following "thereunder" in line inserted the words "or upon a return or three. certificate of an officiating officer" im-

§ 51-21. Issuance of delayed marriage certificates. — In all those cases where a minister or other person authorized by law to perform marriage ceremonies has failed to file his return thereof in the office of the register of deeds who issued the license for such marriage, the register of deeds of such county is authorized to issue a delayed marriage certificate upon being furnished with one or more of the following:

- (1) The affidavit of at least two witnesses to the marriage ceremony;
- (2) The affidavit of one or both parties to the marriage, accompanied by the affidavit of at least one witness to the marriage ceremony;
- (3) The affidavit of the minister or other person authorized by law who performed the marriage ceremony, accompanied by the affidavit of one or more witnesses to the ceremony or one of the parties thereto.
- (4) When proof as required by the three methods set forth in paragraphs (1), (2), and (3) above is not available with respect to any marriage alleged to have been performed prior to January 1, 1935, the register of deeds is authorized to accept the affidavit of any one of the persons named in paragraphs (1), (2), and (3) and in addition thereto such other proof in writing as he may deem sufficient to establish the marriage and any facts relating thereto.

The certificate issued by the register of deeds under authority of this section shall contain the date of the delayed filing, the date the marriage ceremony was actually performed, and all such certificates issued pursuant to this section shall have the same evidentiary value as any other marriage certificates issued pursuant to law.

The register of deeds shall issue the certificates provided for in this section upon the payment of a fee of one dollar and fifty cents (\$1.50) for each such certificate. (1951, c. 1224; 1955, c. 246.)

Editor's Note. — The 1955 amendment inserted paragraph (4).

Chapter 52.

Powers and Liabilities of Married Persons.

Sec.	Sec.
52-1. Property of married persons secured.	public as to contracts or conveyances between husband and wife.
52-2. Capacity to contract.	52-8. Validation of contracts between husband and wife where wife is not privately examined.
52-3. Married person may insure spouse's life.	52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.
52-4. Earnings and damages from personal injury are married person's property.	52-10. Contracts between husband and wife generally; releases.
52-5. Torts between husband and wife.	52-10.1. Separation agreements; execution by minors.
52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.	52-11. Antenuptial contracts and torts.
52-7. Validation of certificates of notaries	52-12. Postnuptial crimes and torts.

§ 52-1. Property of married persons secured.—The real and personal property of any married person in this State, acquired before marriage or to which he or she may after marriage become in any manner entitled, shall be and remain the sole and separate estate and property of such married person and may be devised, bequeathed and conveyed by such married person subject to such regulations and limitations as the General Assembly may prescribe. (Const., Art. X, s. 6; Rev., s. 2093; C. S., s. 2506; 1965, c. 878, s. 1.)

Cross References.—As to property of married women, see also N.C. Const., Art. X, § 6. As to conveyances by husband and wife, see § 39-7 et seq. As to contracts of married persons, see § 52-2 and note thereto.

Editor's Note.—Section 1 of c. 878, Session Laws 1965, repealed and rewrote chapter 52 of the General Statutes. Where present provisions are similar to prior statutory provisions, the historical citations from the former sections have been added to the new sections. Former § 52-1 applied to married women only.

Cases noted in the annotations to present chapter 52 construing provisions of the former chapter have been retained where it is thought they will be helpful.

For a discussion of the history of this legislation and of many of the earlier cases construing it, see Ball v. Paquin, 140 N.C. 83, 52 S.E. 410 (1905). For a discussion of the early law regarding married women's contracts, see the note to § 52-2.

Common-Law Rules.—At common law, marriage was an absolute gift to the husband of all the personal property of the wife in possession, and the same became his property instantly on the marriage; and it was a qualified gift of all the personal property adversely held, and all the choses in action of the wife, which became the husband's absolutely upon his re-

duction of the same into possession, during the coverture, with the right in case the wife died to administer on her estate, and in that character to collect, and after payment of her debts to hold the surplus to his own use, without obligation to distribute to any one. O'Connor v. Harris, 81 N.C. 279 (1879).

It was also competent to the husband having choses in action "jure mariti" to assign the same for value, or as a security to pay his debts, and the assignee availed to pass the right to the assignee to collect and have the proceeds as his absolute property, if collected during coverture, just as the husband might have done if he had kept and reduced it into possession himself. O'Connor v. Harris, 81 N.C. 279 (1879).

The legislature may abolish all the incapacities of married women, and give them full power to contract as femes sole. Pippen v. Wesson, 74 N.C. 437 (1876).

Vested Rights Protected.—Where a husband's right to receive and appropriate to his own use his wife's distributive share in her mother's estate was vested under the law then in force, no subsequent legislation could deprive him of it without his consent. Morris v. Morris, 94 N.C. 613 (1886).

Section Applies to Property Not Secured by Act of Parties.—This section

does not apply to cases where the property is secured to the wife by marriage settlement or deed of gift or will. The property is thereby secured to her by act of the parties. The object of the section is to secure the property to the wife by act of law when it has not been done by act of the parties, who may make restrictions and limitations over. *Cooper v. Landis*, 75 N.C. 526 (1876).

Wife May Hold Legal as Well as Equitable Estate.—Since the adoption of the Constitution of 1868, a married woman has or can have the legal as well as the equitable estate. *Sanderlin v. Sanderlin*, 122 N.C. 1, 29 S.E. 55 (1898).

Prior to the adoption of the Constitution of 1868 it was held that deeds by which property was conveyed to a trustee for the sole and separate use of a married woman created an active trust in the trustee, and this was held because otherwise the statute would execute the use, and the husband would, as husband, become vested with rights in and control over his wife's property. But by the Constitution of 1868, as declared in *Walker v. Long*, 109 N.C. 510, 14 S.E. 299 (1891), the wife's property was rendered secure to her, and not subject to the control of, or to the debts or obligations of, her husband. So that it was no longer necessary to invoke the fiction of the law in order to protect the wife's property from the husband or his creditors in deeds made subsequent to the adoption of that Constitution. *Freeman v. Lide*, 176 N.C. 434, 97 S.E. 402 (1918). See also *Pippen v. Wesson*, 74 N.C. 437 (1876).

Contracts Strictly in Personam.—In construing N.C. Const., Art. X, § 6, and the statutes passed on the subject, it has been held that a married woman living with her husband was not enabled to bind herself by contracts strictly in personam, but that the constitutional provision declaring her property, real and personal, to be her sole and separate estate was intended and operated to enable her to charge her personal estate by contracts on the principle by which, under recognized equitable principles, she was formerly allowed to charge her separate estate in the hands of a trustee and her real estate also by contract in which her husband joined and the wife's privy examination taken. *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915). See *Pippen v. Wesson*, 74 N.C. 437 (1876); *Flaum v. Wallace*, 103 N.C. 296, 9 S.E. 567 (1889); *Farthing v. Shields*, 106 N.C. 289, 10 S.E. 998 (1890); *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905). See also

Sanderlin v. Sanderlin, 122 N.C. 1, 29 S.E. 55 (1898).

Mechanic's Lien on Married Woman's Property.—By construing N.C. Const., Art. X, §§ 6 and 3, in connection with § 44-1, the conclusion is sustained that for all debts contracted for work and labor done, a lien is given upon the property of a married woman. *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905).

Disposition of Personality.—There is no restriction whatever upon the right of a married woman to dispose of her personality as fully and freely as if she had remained unmarried, either in the Constitution or by any statute. *Vann v. Edwards*, 135 N.C. 661, 47 S.E. 784 (1904); *Ball v. Paquin*, 140 N.C. 83, 52 S.E. 410 (1905); *Rea v. Rea*, 156 N.C. 529, 72 S.E. 873 (1911).

Chapter Creates No New Rights in Husband.—The provisions of this chapter, insofar as the husband is concerned, constitute in the main abridgements of rights he had as to his wife's property under the common law, and do not purport to create in him, as against her, rights he did not have at common law. *Scholtens v. Scholtens*, 230 N.C. 149, 52 S.E. 350 (1949).

Interest of Husband.—The real property of the wife, whether acquired before or after marriage, remains her sole and separate property under N.C. Const., Art. X, § 6, and therein the husband has no vested interest. *Vann v. Edwards*, 135 N.C. 661, 47 S.E. 784 (1904); *Kilpatrick v. Kilpatrick*, 176 N.C. 182, 96 S.E. 988 (1918).

Money from Sale of Wife's Realty.—Money received by the husband from a sale of the wife's lands before the adoption of the Constitution in 1868 belonged to him absolutely, unless at the time he received it he agreed to invest it for her in some other way. But if the wife acquired the title and the marriage occurred prior to 1868, and the sale was made subsequent to that time, the proceeds would be her separate estate; and if the husband purchased other lands with such proceeds and took title in his own name, in the absence of any special agreement to the contrary, he would become a trustee for her. *Kirpatrick v. Holmes*, 108 N.C. 206, 12 S.E. 1037 (1891).

Presumption as to Property Delivered to Husband.—Under the change made in the law of married women's property rights by this section and the N.C. Const., Art. X, § 6, where a married woman receives checks from her parents as personal gifts to her, which she endorses and

delivers to her husband, there is a presumption that he receives the money in trust for her, and in the absence of evidence that it was a gift, she may recover the same in her action against him, or, after his death, against his personal representative. Etheredge v. Cochran, 196 N.C. 681, 146 S.E. 711 (1929).

Statute of Limitations.—Since a wife may now maintain an action without the

joinder of her husband, when it concerns her separate property, and against her husband when it is between the husband and wife, and there being no exception in favor of the wife when she holds a claim against him, the statute of limitation will run against a note thus held by her. Graves v. Howard 159 N.C. 594, 75 S.E. 998 (1912). See § 1-18.

§ 52-2. Capacity to contract.—Subject to the provisions of G.S. 52-6, G.S. 39-7 and other regulations and limitations now or hereafter prescribed by the General Assembly, every married person is authorized to contract and deal so as to affect his or her real and personal property in the same manner and with the same effect as if he or she were unmarried. (1871-2, c. 193, s. 17; Code, s. 1826; Rev., s. 2094; 1911, c. 109; C. S., s. 2507; 1945, c. 73, s. 16; 1965, c. 878, s. 1.)

- I. In General.
- II. Powers Conferred.
- III. Liabilities Incurred.
- IV. Remedies for Breach.

Cross References.

See Editor's note to § 52-1. As to conveyances by husband and wife, see § 39-7 et seq. For repeal of laws requiring private examination of married women, see § 47-14.1.

I. IN GENERAL.

Editor's Note. — Former § 52-2 applied to married women only.

At common law the contract of a married woman was void, but it was held in equity that she might have an estate settled to her separate use, and, that although she had no power to bind herself personally, she might with the concurrence of the trustee specifically charge her separate estate, and the courts of equity would enforce the charge against the property. But her contracts, in order to create a charge, had to refer expressly, or by necessary implication, to the separate estate as a means of payment, this being in the nature of an appointment or appropriation. Frazier v. Brownlow, 38 N.C. 237 (1844); Knox v. Jordan, 58 N.C. 175 (1859); Pippen v. Wesson, 74 N.C. 437 (1876); Sanderlin v. Sanderlin, 122 N.C. 1, 29 S.E. 55 (1898).

The common-law rule continued to be the law in this State until the adoption of the Constitution of 1868. Pippen v. Wesson, 74 N.C. 437 (1876). Chapter 193, s. 17, Laws 1871-2, known as the Marriage Act, was the first legislation directly regulating the power of a married woman to make contracts. It seems that the only change made by this act was that the consent of the husband in writing was re-

quired in order to allow her to charge her separate estate. See Arrington v. Bell, 94 N.C. 247 (1886). However, a subsequent statute, known as the Martin Act, was passed March 6, 1911 and entirely changed the law. See 13 N.C.L. Rev. 62. The present section, except insofar as it is not limited to married women, is similar to the Martin Act.

Legislature Has Power to Remove Restraints.—The restraints upon a married woman's power to "contract" rest upon the statute, not upon the Constitution, and of course can be removed by statute. There is no prohibition upon the legislature to do so, and indeed the Supreme Court in many instances has indicated to the legislature that justice might be facilitated by more liberal legislation in that regard. Finger v. Hunter, 130 N.C. 529, 41 S.E. 890 (1902).

This section operated prospectively and did not apply to contracts made prior to its adoption. Stephens v. Hicks, 156 N.C. 239, 72 S.E. 313 (1911).

Section Does Not Apply to Estates in Entirety.—The doctrine of title by entireties between husband and wife as it existed at common law remains unchanged by statute in this State. And this section has been construed, in Jones v. Smith, 149 N.C. 318, 62 S.E. 1092 (1908), as not affecting estates held by husband and wife as tenants by the entirety. Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); In re Perry, 256 N.C. 65, 123 S.E. 2d 99 (1961).

Statute providing that earnings and damages from personal injury are wife's property (now § 52-4) should be read in

light of this section. *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

For note on right of husband to recover medical expenses of wife from tort-feasor, see 37 N.C. Law Rev. 82.

II. POWERS CONFERRED.

Married Women Made Sui Juris.—The effect of the Martin Act was to take married women out of the classification which the law recognized, prior to its enactment, and to make them, with respect to capacity to contract, *sui juris*. *Lipinsky v. Revell*, 167 N.C. 508, 83 S.E. 820 (1914); *Royal v. Southerland*, 168 N.C. 405, 84 S.E. 708 (1915); *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915); *Thrash v. Ould*, 172 N.C. 728, 90 S.E. 915 (1916); *Satterwhite v. Gallagher*, 173 N.C. 525, 92 S.E. 369 (1917); *Dorsey v. Corbett*, 190 N.C. 783, 130 S.E. 842 (1925); *Tise v. Hicks*, 191 N.C. 609, 132 S.E. 560 (1926); *Taft v. Covington*, 199 N.C. 51, 153 S.E. 597 (1930). See *Davis v. Cockman*, 211 N.C. 630, 191 S.E. 322 (1937); *Etheridge v. Wescott*, 244 N.C. 637, 94 S.E.2d 846 (1956).

By virtue of this section, a married woman may make contracts affecting her personal and real property as though she were unmarried, except that the requirements of § 52-6 must be met in contracts between her and her husband. *Martin v. Bundy*, 212 N.C. 437, 193 S.E. 831 (1937). See §§ 39-7 et seq., 52-6 and notes thereto.

This section should be held to mean what it plainly says, that, except as to contracts with her husband, in which the forms required by § 52-6 must still be observed, a married woman can now make any and all contracts so as to affect her real and personal property, in the same manner and to the same effect as if she were unmarried. *Lipinsky v. Revell*, 167 N.C. 508, 83 S.E. 820 (1914); *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915); *Everett v. Ballard*, 174 N.C. 16, 93 S.E. 385 (1917); *Taft v. Covington*, 199 N.C. 51, 153 S.E. 597 (1930). See *Davis v. Cockman*, 211 N.C. 630, 191 S.E. 322 (1937).

Subject to well established exceptions, a married woman may contract and deal so as to affect her real and personal property in the same manner and with the same effect as if she were unmarried. *Cruthis v. Steele*, 259 N.C. 701, 131 S.E. (2d) 344 (1963).

This section practically constitutes married women free traders as to all their ordinary dealings. *Price v. Charlotte Elec.*

Ry., 160 N.C. 450, 76 S.E. 502 (1912); *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921).

Section 52-6 Not Affected.—This section does not alter the effect of § 52-6, requiring certain findings and conclusions by the probate officer to a conveyance of her lands directly to her husband, and her deed not probated accordingly, is void. *Singleton v. Cherry*, 168 N.C. 402, 84 S.E. 698 (1916); *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915).

Husband and Wife May Form Business Partnership.—This section has been held to vest the wife with the power to contract with the husband so as to create a business partnership. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E.2d 243 (1948).

Oral Agreement to Hold Land in Trust for Husband.—A married woman is under no legal handicap which would prevent her from entering into an oral agreement with her husband to hold title to real estate for his benefit or for their joint benefit. *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E.2d 418 (1945).

III. LIABILITIES INCURRED.

Liability for Breach of Contract.—When the legislature authorized a married woman to contract and deal so as to affect her real and personal property in the same manner, and with the same effect, as if she were unmarried, it authorized contracts for breach of which she would be liable as fully as if she had remained unmarried. *Everett v. Ballard*, 174 N.C. 16, 93 S.E. 385 (1917).

Same—Contract to Convey Realty.—On a breach of a married woman's contract to convey her land, she may be held responsible in damages, as in other contracts by which she is properly bound. *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915).

Liability of Wife Where Husband Agent.—Under this section, a wife may appoint her husband as her agent for doing in her behalf work which may be of such dangerous character as to be a menace to the safety of others, and is liable with him for his negligence. *Richardson v. Libes*, 188 N.C. 112, 123 S.E. 306 (1924).

Where Husband Is Alien.—Under the former law it was held that a married woman whose husband was an alien and never visited or resided in the United States was personally liable on her contracts. *Levi v. Marsha*, 122 N.C. 656, 29 S.E. 832 (1898).

Liability as Partner or Surety.—Since

the passage of the Martin Act, a wife has been held liable jointly and severally on her contracts whenever a partner or a surety. *Bristol Grocery Co. v. Bails*, 177 N.C. 298, 98 S.E. 768 (1919).

Same—Where Wife Is Surety for Husband.—A wife by becoming surety on the obligations of her husband creates a direct and separate liability to the creditor of the husband which makes her personally responsible, under this section, without requiring the statutory formalities necessary to the validity of certain contracts made directly between the wife and her husband. *Royal v. Sutherland*, 168 N.C. 405, 84 S.E. 708 (1915).

Estoppel.—Since, in this State, the common-law disabilities of a married woman to contract, with certain exceptions, have been removed, she is bound by an estoppel the same as any other person. *Tripp v. Langston*, 218 N.C. 295, 10 S.E.2d 916 (1940). See also *Builders' Sash & Door Co. v. Joyner*, 182 N.C. 518, 109 S.E. 259 (1921), wherein the question whether the doctrine of title by estoppel applies to a married woman was raised but not decided; *Cruthis v. Steele*, 259 N.C. 701, 131 S.E.2d 344 (1963).

Husband Still Liable for Funeral Expenses and Necessaries.—The common-law rule that the husband is liable for the funeral expenses of his deceased wife and for "necessaries" during their married life is not affected by this section, when there is nothing to show an express promise to pay on her part, or that the articles were sold on her credit or under such circumstances as to make her exclusively or primarily liable according to the equitable principles of *indebitatus assumpsit*. Bo-

§ 52-3. Married person may insure spouse's life.—Any married person in his or her own name, or in the name of a trustee with his assent, may cause to be insured for any definite time the life of his or her spouse, for his or her sole and separate use, and may dispose of the interest in the same by will. (Rev., s. 2099; C. S., s. 2512; 1965, c. 878, s. 1.)

Cross References.—See Editor's note to § 52-1. As to right of husband to insure life for the benefit of wife and children, see N.C. Const., Art. X, § 7.

§ 52-4. Earnings and damages from personal injury are married person's property.—The earnings of a married person by virtue of any contract for his or her personal service, and any damages for personal injuries, or other tort sustained by either, can be recovered by such person suing alone, and such earnings or recovery shall be his or her sole and separate property. (1913, c. 13, s. 1; C. S., s. 2513; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's note to § 52-1.

Editor's Note. — Former § 52-4 related

wen v. Daugherty, 168 N.C. 242, 84 S.E. 265 (1915).

IV. REMEDIES FOR BREACH.

Specific Performance.—When a married woman makes an executory contract to convey land and the requirements of § 39-7, regarding instruments affecting a married woman's title, are not complied with, she can only be held in damages, and specific performance may not be enforced. *Warren v. Dail*, 170 N.C. 406, 87 S.E. 126 (1915).

Judgment against Wife as Surety for Husband.—In *Royal v. Southerland*, 168 N.C. 405, 81 S.E. 708 (1915), it was held that under this section a judgment could be rendered against a wife upon her obligation as surety to her husband. *Thrash v. Ould*, 172 N.C. 728, 90 S.E. 915 (1916).

Judgment Enforced by Execution.—It was held in *Lipinsky v. Revell*, 167 N.C. 508, 83 S.E. 820 (1914), construing this section, that judgment could be rendered against a married woman upon her contracts and enforced by execution, though she had not specifically charged her property with payment thereof. *Thrash v. Ould*, 172 N.C. 728, 90 S.E. 915 (1916).

Wife May Claim Personal Property Exemption.—Under the provisions of N.C. Const., Art. X, § 1, and of this section, the wife may claim her personal property exemption from the assets of a partnership with her husband when the validity of the partnership contract is not questioned by them under the provisions of § 52-6, and each has consented that such exemption should be allowed to the other therefrom. *Bristol Grocery Co. v. Bails*, 177 N.C. 298, 98 S.E. 768 (1919).

Editor's Note. — Former § 52-3 related to the capacity of a married woman to draw checks.

§ 52-4. Earnings and damages from personal injury are married person's property.—The earnings of a married person by virtue of any contract for his or her personal service, and any damages for personal injuries, or other tort sustained by either, can be recovered by such person suing alone, and such earnings or recovery shall be his or her sole and separate property. (1913, c. 13, s. 1; C. S., s. 2513; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's note to § 52-1.

Editor's Note. — Former § 52-4 related

to husband's joinder in conveyance or lease of wife's land.

In the concurring opinion in Patterson

v. Franklin, 168 N.C. 75, 84 S.E. 18 (1915), Clark, C.J., states that this section was passed as a result of the decision in Price v. Charlotte Elec. Co., 160 N.C. 450, 76 S.E. 502 (1912). To the same effect, see Kirkpatrick v. Crutchfield, 178 N.C. 348, 100 S.E. 602 (1919). The law formerly prevailing allowed the husband the earnings of his wife and the proceeds of her labor, but the husband could confer upon the wife the right to her earnings, upon which they became her separate estate, giving her a right of action to recover them in her own name. Patterson v. Franklin, 168 N.C. 75, 84 S.E. 18 (1915).

For brief comment on this section, see 29 N.C. Law Rev. 178.

Section Read in Light of Constitution and § 52-2.—This section should be read in the light of N.C. Const., Art. X, § 6, which protects a married woman in the sole ownership of her property, and also in connection with § 52-2, which seeks to secure to her the free use of her property. Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

Husband Deprived of Former Rights.—By virtue of the statutes giving married women separate property rights and the right to sue for injuries, the husband is deprived of his former rights in her property and choses in action. Hinnant v. Tidewater Power Co., 189 N.C. 120, 126 S.E. 307 (1925).

Husband's Common-Law Right of Action Transferred to Wife.—A married woman is now entitled to recover in tort for all pecuniary loss sustained by her, including nursing and care, and loss from inability to perform labor or to carry on her household duties. This transfers to the wife, the husband's common-law right of action to recover for her services and for imposed nursing and care occasioned by the tort of another. Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

Overlapping Recovery Denied.—The effect of the legislation is to equalize the legal status of husband and wife, and to deny to each any overlapping recovery on account of the other's loss or injury. Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

Action of Wife for Tort to Husband.—In Hipp v. Dupont, 182 N.C. 9, 13, 108 S.E. 318 (1921), the court said: "It follows therefore [from the former wording of this section] that the husband cannot sue to recover his wife's earnings, or damages for tort committed on her and there is no reason why she can sue for

tort or injuries inflicted on her husband. The law has never authorized the wife to maintain such action for torts sustained by the husband."

Action against Seducer.—Under the provisions of this section, a married woman who has been seduced may, in proper instances, maintain her action for damages against her seducer without joinder of her husband as a party. Hayatt v. McCoy, 194 N.C. 25, 138 S.E. 405 (1927).

Recovery for Loss of Consortium.—It is now well settled in practically every jurisdiction that the wife has a right to the consortium of her husband and can recover when there has been an intentional and direct invasion or breach of the marital relations. In every case, however, the recovery was allowed only where there was an intentional invasion. The right of the wife to recover in North Carolina for a direct and intentional invasion is clearly settled. Brown v. Brown, 124 N.C. 19, 32 S.E. 320 (1899). See also 3 N.C.L. Rev. 100.

When a married woman is negligently injured by the tort of another, her husband cannot maintain an action to recover damages sustained by him through (1) imposed nursing and care, (2) loss of his wife's services, (3) mental anguish, and (4) loss of consortium. Under existing law, the injured spouse alone may sue for his or her earnings or damages for personal injuries. Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945).

Impairment of Capacity to Work and Earn Money.—This section is in accord with the realistic trend of the modern decisions, which recognize the fact that a wife, as an individual, has a personal right to work and earn money, whether she is gainfully employed at the time or engaged merely in the performance of household duties; and where her capacity to work and earn money is impaired by injury, she has suffered a definite, substantial loss. Johnson v. Lewis, 251 N.C. 797, 112 S.E. (2d) 512 (1960).

A person is not deprived of the right to recover damages because of inability to labor or transact business in the future, because of the fact that at the time of the injury he is not engaged in any particular employment. The fact that a woman attends merely to household duties will not deprive her of a right to recover for loss of earning capacity. Johnson v. Lewis, 251 N.C. 797, 112 S.E. (2d) 512 (1960).

Extent of Wife's Power to Bring Actions.—A married woman has the fullest

power to bring actions, even against her husband and in all cases whatever. *Crowell v. Crowell*, 180 N.C. 516, 105 S.E. 206 (1920); *In re Will of Witherington*, 186 N.C. 153, 119 S.E. 11 (1923). And her right to sue her husband extends to tort actions. *Crowell v. Crowell*, 181 N.C. 66, 106 S.E. 149 (1921).

The common-law disability of spouses to sue each other in tort actions has been completely removed in this State. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

In this jurisdiction a wife may maintain an action against her husband for negligent injury, or if such injury results in death, her personal representative may maintain such action. *King v. Gates*, 231 N.C. 537, 57 S.E. (2d) 765 (1950).

Nonresident Wife Has Right of Action for Husband's Tort.—The right of a married woman to maintain an action against her husband to recover for negligent injury is not limited to residents of this State, and a nonresident wife may maintain an action here against her nonresident husband on a transitory cause of action which arises in this State, and she is entitled to any recovery as her separate property. *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941).

Services rendered by a married woman outside the home, and not within the scope of her household or domestic duties, would properly be recoverable on implied assumpsit or quantum meruit in her own name. *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E.2d 477 (1945).

Services Rendered to Husband.—For a wife to recover for services rendered to her husband in his business, or outside of her domestic duties, while living with him under the marital relation, there must be either an express or an implied promise on his part to pay for them; and the relationship of marriage, nothing else appearing, negatives an implied promise on his part to pay. *Dorsett v. Dorsett*, 183 N.C. 354, 111 S.E. 541 (1922).

Husband and Wife Employed Together.—Since the passage of the Martin Act (§ 52-2) and this section, the separate earnings of a married woman belong to her, and she may sue and recover them alone; and where the evidence tends only

to establish the fact that the employer was to pay a husband and wife each a certain and different amount for services, the husband may not recover the whole upon the theory that the amount he was to receive was augmented by what she was to receive for her separate services. *Croom v. Goldsboro Lumber Co.*, 182 N.C. 217, 108 S.E. 735 (1921).

The mutual rights and duties growing out of the marital relationship are not affected by this and the following sections. *Ritchie v. White*, 225 N.C. 450, 35 S.E. 2d 414 (1945).

A married woman is still a feme covert with the rights, privileges and obligations incident to such status under the law. *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E.2d 477 (1945), citing *Buford v. Mochy*, 224 N.C. 235, 29 S.E.2d 729 (1944).

This section does not relieve a married woman of her marital obligations, or deny to her the privilege of sharing in the family duties and aiding in such work as the helpmeet of her husband, when minded so to do. *Coley v. Dalrymple*, 225 N.C. 67, 33 S.E.2d 477 (1945), citing *Helmstetler v. Duke Power Co.*, 224 N.C. 821, 32 S.E.2d 611 (1945).

Joinder of Husband Unnecessary.—Since the passage of this section a married woman may sue without joining her husband to recover damages she has sustained by reason of a personal injury wrongfully inflicted. *Kirkpatrick v. Crutchfield*, 178 N.C. 348, 100 S.E. 602 (1919).

Same—Not Improper.—While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a quantum meruit, under this section, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a quantum meruit, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife proceeded with. *Shore v. Holt*, 185 N.C. 312, 117 S.E. 165 (1923).

Applied in *Owens v. Kelly*, 240 N.C. 770, 84 S.E. (2d) 163 (1954); *Burton v. Dixon*, 259 N.C. 473, 131 S.E. (2d) 27 (1963).

§ 52-5. Torts between husband and wife.—A husband and wife have a cause of action against each other to recover damages sustained to their person or property as if they were unmarried. (1951, c. 263; 1965, c. 878, s. 1.)

this section, see 29 N.C. Law Rev. 395.

Purpose of Section.—This section was intended to change for the future the re-

Cross Reference.—See Editor's note to § 52-1.

Editor's Note.—For brief comment on

sult reached in *Scholtens v. Scholtens*, 230 N. C. 149, 52 S. E. (2d) 350 (1949); 29 N. C. Law Rev. 359. *Shaw v. Lee*, 258 N. C. 609, 129 S. E. (2d) 288 (1963).

The legislature by statute modified the common law and permitted the wife to sue the husband for injuries tortiously inflicted. *Shaw v. Lee*, 258 N. C. 609, 129 S. E. (2d) 288 (1963).

The common-law disability of spouses to sue each other in tort actions has been completely removed in this State. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

This section permits one spouse to maintain an action against the other for injuries caused by his or her tort. *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

Thus, Husband May Recover from Wife Medical Expenses He Paid for Daughter Negligently Injured by Wife.—By virtue of the express provisions of this section, a plaintiff-father was entitled to recover from the defendant-mother the medical expenses expended by him on behalf of his

daughter for injuries to her caused by defendant's actionable negligence in the operation of an automobile. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

Plaintiff's action to recover necessary medical expenses expended by him for his infant daughter is within the fair intent and meaning of this section imposing liability for damages sustained to property. *Foster v. Foster*, 264 N.C. 694, 142 S.E.2d 638 (1965).

And Wrongful Death Action May Be Maintained against Husband for Wife's Death.—If a husband's negligence results in the death of his wife, her personal representative may maintain an action against him for her wrongful death. *Cox v. Shaw*, 263 N.C. 361, 139 S.E.2d 676 (1965).

The legislature did not intend to extend its enactments beyond our borders and create in a spouse a right of action against the other for acts done beyond the borders of North Carolina. *Shaw v. Lee*, 258 N. C. 609, 129 S. E. (2d) 288 (1963).

§ 52-6. Contracts of wife with husband affecting corpus or income of estate; authority, duties and qualifications of certifying officer; certain conveyances by married women of their separate property.—(a) No contract between husband and wife made during their coverture shall be valid to affect or change any part of the real estate of the wife, or the accruing income thereof for a longer time than three years next ensuing the making of such contract, nor shall any separation agreement between husband and wife be valid for any purpose, unless such contract or separation agreement is in writing, and is acknowledged before a certifying officer who shall make a private examination of the wife according to the requirements formerly prevailing for conveyance of land.

(b) The certifying officer examining the wife shall incorporate in his certificate a statement of his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife. The certificate of the officer shall be conclusive of the facts therein stated but may be impeached for fraud as other judgments may be.

(c) Such certifying officer must be a justice of the Supreme Court, a judge of the superior court, a judge of the district court, a clerk, assistant clerk, or deputy clerk of the superior court, or a justice of the peace, or a magistrate, or the equivalent or corresponding officers of the state, territory or foreign country where the acknowledgment and examination is made.

(d) This section shall not apply to any judgment of the superior court or other State court of competent jurisdiction, which, by reason of its being consented to by a husband and his wife, or their attorneys, may be construed to constitute a contract between such husband and wife.

(e) Any other provisions of this section to the contrary notwithstanding, in all cases where a married woman owning property as an individual joins with her husband in execution of a deed conveying her real property to a third party and said third party reconveys said real property to said wife and her husband as tenants by the entirety and in the deed to the third party the acknowledgment as herein provided was not complied with, but in all other respects the acknowledgment of the execution of said deed and the probate and registration thereof are regular, such conveyances shall not be void but shall be voidable only, and any action, the purpose of which is to have said conveyances set aside or declared in-

valid shall be commenced within seven (7) years after the recordation of such deed in the office of the register of deeds of the county or counties in which said real property is located. If no such action is or has been brought then the effect of the conveyances shall be to create an estate by the entirety. (1871-2, c. 193, s. 27; Code, s. 1835; Rev., s. 2107; C. S., s. 2515; 1945, c. 73, s. 19; 1947, c. 111; 1951, c. 1006, s. 2; 1955, c. 1082; 1957, c. 1229, s. 1; 1963, c. 909, ss. 1, 4; 1965, c. 878, s. 1.)

- I. In General.
- II. Transactions Included.
- III. The Certificate.
- IV. Effect of Noncompliance.

Cross References.

See Editor's note to § 52-1. See also § 52-2 and note thereto. As to conveyances by husband and wife, see § 39-7 et seq. As to separation agreements, see § 52-10 and note thereto.

I. IN GENERAL.

Editor's Note.—Former § 52-6 related to contracts and conveyances of married woman whose husband had abandoned her. The provisions of present § 52-6 are similar to those of former § 52-12.

For note on conveyances between spouses in the creation of estates by the entirety, see 34 N. C. Law Rev. 571.

Common-Law Rule.—All transactions of the wife with her husband in regard to her separate property were held void at common law. Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887). This was because at common law the husband and wife were deemed one person, and it was necessary to convey to a third person, as a conduit, in order to pass the title to property from one to the other. Sydnor v. Boyd, 119 N.C. 481, 25 S.E. 92 (1896).

The purpose of this section was to prevent frauds by the husband upon the wife, and to give validity to transactions, invalid at common law, between husband and wife, of the nature described, provided they are executed with the prescribed formality. Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887); Long v. Rankin, 108 N.C. 338, 12 S.E. 987 (1891); Stout v. Perry, 152 N.C. 312, 67 S.E. 757 (1910); Perry v. Stancil, 237 N. C. 442, 75 S. E. (2d) 512 (1953).

This section was passed to protect the wife from the influence and control which the husband is presumed to have over her by reason of the marital relation. Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887). The law presumes that contracts between husband and wife affecting her real estate are executed under the influence and coercion of the husband, and to rebut this presumption and render the contract valid, an offi-

cer of the law must examine the contract, and be satisfied that she is doing what is reasonable and not hurtful to her, and so certify. Kearney v. Vann, 154 N.C. 311, 70 S.E. 747 (1911); Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927).

Constitutionality.—Former provisions similar to this section were held to be constitutional and valid in Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887); Long v. Rankin, 108 N.C. 338, 12 S.E. 987 (1891); Kearney v. Vann, 154 N.C. 311, 70 S.E. 747 (1911); Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915).

Section Not Repealed by § 47-14.1.—Honeycutt v. Citizens Nat. Bank, 242 N.C. 734, 89 S. E. (2d) 598 (1955).

Strict Construction.—This section is an enabling statute and must be strictly construed. Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927).

It is necessary that it should affirmatively appear that the provisions of this section have been strictly complied with. Sims v. Ray, 96 N.C. 87, 2 S.E. 443 (1887); Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915).

Legislature Did Not Intend to Reduce Marriage to Commercial Basis.—While in ordinary transactions married women are permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. Ritchie v. White, 225 N.C. 450, 35 S.E. 2d 414 (1945).

Duty of Support Not a "Debt."—It is the public policy of the State that a husband shall provide support for himself and his family. This duty he may not shirk, contract away, or transfer to another. It is not a "debt" in the legal sense of the word, but an obligation imposed by law, and penal sanctions are provided for its willful neglect or abandonment. Motley v. Motley, 255 N. C. 190, 120 S. E. (2d) 422 (1961).

Effect of Fraud by Husband.—Where

the jury finds that a release signed by the wife in favor of the husband was procured by fraud, the husband's contention that the fact that the acknowledgment of the release taken in conformity with this section precludes attack of the release for want of consideration, is untenable, since in such instance there is no contract to which the provisions of this section could apply. *Garrett v. Garrett*, 229 N.C. 290, 49 S.E.2d 643 (1948).

Applied in *Baker v. Murphrey*, 254 N.C. 506, 119 S.E. (2d) 398 (1961); *Richardson v. Richardson*, 257 N.C. 705, 127 S.E. (2d) 525 (1962); *Richardson v. Richardson*, 261 N.C. 521, 135 S.E.2d 532 (1964).

II. TRANSACTIONS INCLUDED.

Separation agreements are to be executed in conformity with the requirements of this section governing contracts between husband and wife. This requirement is logical and sound in view of the fact that the right of a married woman to support and maintenance is held in this jurisdiction to be a property right. *Bolin v. Bolin*, 246 N.C. 666, 99 S.E. (2d) 920 (1957).

The right of a married woman to support and maintenance is held in this jurisdiction to be a property right, and the wife may release such right by contract in the manner set out in this section. *Kiger v. Kiger*, 258 N.C. 126, 128 S.E. (2d) 235 (1962); *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963).

Deeds of separation, though not favored by law, are under certain circumstances recognized by this section and § 52-10, when signed in conformity therewith. *Taylor v. Taylor*, 197 N.C. 197, 148 S.E. 171 (1929). See also *Brown v. Brown*, 205 N.C. 64, 169 S.E. 818 (1933).

Where a separation agreement, duly acknowledged as required by this section, provided that the wife did thereby quitclaim any and all right, title and interest in particularly described property held by the entirieties, and she therein agreed to execute a warranty deed conveying such interest, but the deed was not acknowledged in conformity with this section and the parties thereafter resumed the marital relationship, it was held that the deed of separation constituted a conveyance to the husband of all the wife's right, title, and interest in such property, and the resumption of the marital relationship did not affect the executed conveyance. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963).

Deeds of realty are embraced in the term "contracts," used in this section, for

a deed is an executory contract until delivered, and after delivery it becomes an executed contract. *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915), distinguishing *Rea v. Rea*, 156 N.C. 529, 72 S.E. 573 (1911). See *Singleton v. Cherry*, 168 N.C. 402, 84 S.E. 698 (1915).

Section Applies to Every Form of Conveyance Except Testamentary Devise.—A married woman cannot convey her real property to her husband directly or by any form of indirection without complying with the provisions of this section. Any manner of conveyance—testamentary devises excepted—otherwise than as therein provided is void. *Ingram v. Easley*, 227 N.C. 442, 42 S.E.2d 624 (1947), containing specific examples of transactions that are void for want of compliance with this section.

Parol Transfer for Less than Three Years Is Valid.—A wife can upon a fair consideration give land by parol to her husband for a period less than three years under this section. *Wells v. Batts*, 112 N.C. 283, 17 S.E. 417 (1893).

An oral contract which undertakes to bind the wife to release her dower interest in the lands of her husband was invalidated by this section. *Luther v. Luther*, 234 N.C. 429, 67 S.E. (2d) 345 (1951). As to abolition of dower and right of surviving spouse to elect life estate, see §§ 29-4, 29-30.

Wife's Interest in Estate by Entirieties.—During the continuance of the joint lives of a husband and wife who have acquired an estate by entirieties, the wife's interest in the lands is such as is contemplated by this section; and where the estate has been conveyed to one in trust for the husband, and the officer in taking the acknowledgment of the wife has failed to make the certificate required by this section, requiring him, as a prerequisite to its validity, to certify that the instrument was not unreasonable or injurious to her, the instrument itself is void, and the husband may not, by will or otherwise, dispose of her interest thereunder. *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Honeycutt v. Citizens Nat'l Bank*, 242 N.C. 734, 89 S.E.2d 598 (1955).

A deed by husband and wife conveying lands held by them by entirieties to a trustee for the use and benefit of the husband is a conveyance of land by a wife to her husband within the meaning of this section. *Fisher v. Fisher*, 217 N.C. 70, 6 S.E.2d 812 (1940).

A conveyance from one spouse to the other of an interest in an estate held by the entirieties is valid as an estoppel when the requirements of the law are complied

with in the execution thereof. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963).

Land Bought with Wife's Money and Conveyed by Entirety.—When land is purchased by the wife with money belonging to her separate estate, with conveyance to the husband and wife by entirety, it is not a gift by the wife to her husband of her personal property, and though thus conveyed at her request creates a resulting trust in the lands in her favor. *Deese v. Deese*, 176 N.C. 527, 97 S.E. 475 (1918).

Wife's Guaranty of Husband's Trade Acceptances.—This section has no application to wife's guaranty of payment of her husband's trade acceptances. *Arcady Farms Milling Co. v. Wallace*, 242 N.C. 686, 89 S.E. (2d) 413 (1955).

Conveyance from Mother to Daughter and Daughter's Husband.—A mother, for the purpose of dividing her lands between her four children, executed deeds conveying separate tracts to each respectively, and in the deed to her daughter made the conveyance to her daughter and the daughter's husband. It was held that the daughter had no interest in the land prior to the conveyance or right to determine the disposition the parent should make of it by deed or will, and therefore there was no conveyance of any interest in the land by the daughter to her husband, and this section was not applicable. *Edwards v. Batts*, 245 N.C. 693, 97 S.E. (2d) 101 (1957).

An agreement by husband and wife to pool their respective lands for division among their children is not an agreement under which any interest in his wife's lands moves to the husband, and it is not required that such agreement be executed in accord with this section. *Coward v. Coward*, 216 N.C. 506, 5 S.E.2d 537 (1939).

Agreement to Hold in Trust Land Conveyed to Wife by Third Party.—A married woman may enter into a parol agreement with her husband to hold title to real estate conveyed to her by a third party, for his benefit or for their joint benefit. Such an agreement would not involve her separate estate; consequently the contract is not required to be executed in the manner set forth in this section. *Bass v. Bass*, 229 N.C. 171, 48 S.E.2d 48 (1948). See *Williams v. Williams*, 231 N.C. 33, 56 S.E.2d 20 (1949).

Conveyance of Wife's Land to Third Party in Trust for Husband.—The law will not permit the salutary object of this section to protect married women to be circumvented by indirection, and a wife

may not effectually convey her real estate to a third person to be held in trust by him for the husband or to be conveyed by him to the husband unless the examining or certifying officer incorporates in his certificate his conclusions that the conveyance is not "unreasonable or injurious to the wife." *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948). See *Davis v. Bass*, 188 N.C. 200, 124 S.E. 566 (1924); *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925); *Garner v. Horner*, 191 N.C. 539, 132 S.E. 290 (1926).

Conveyance to Third Party Who Conveys to Husband.—Where husband and wife conveyed wife's property to a third party, the mere fact that on the following day the property was conveyed to the husband and the consideration recited in each deed was the same was not sufficient to conclusively establish that the third party was a mere means to accomplish an illegal purpose. *Stokes v. Smith*, 246 N.C. 694, 100 S.E. (2d) 85 (1957).

Appointment of Husband as Agent to Settle Wife's Debts.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of this section is not necessary. *Stout v. Perry*, 152 N.C. 312, 67 S.E. 757 (1910).

Notes for Purchase Price of Wife's Land Payable to Husband and Wife Jointly.—Where the wife has conveyed her lands and with the consent of all parties takes a mortgage back on the same day and as a part of the same transaction, to secure notes given in part payment of the purchase price, payable to herself and her husband jointly, it is not evidence that she made him an unqualified gift, either of the notes or a half thereof, and they remain her property as fully as the land for which consideration alone they were given; and the transaction comes within the express letter as well as the spirit of this section. *Kilpatrick v. Kilpatrick*, 176 N.C. 182, 96 S.E. 988 (1918).

Contract Creating Business Partnership between Husband and Wife.—Husband and wife may enter into a contract creating a business partnership between them under § 52-2, but where the wife's separate estate is involved as a part of the partnership property, the provisions of this section must be observed. *Eggleston v. Eggleston*, 228 N.C. 668, 47 S.E.2d 243 (1948).

III. THE CERTIFICATE.

Certificate Must Be Annexed to Deed.—It has been uniformly held that the deed

of a wife, conveying land described therein to her husband, is void, unless there is attached or annexed to the deed the certificate of the probate officer as required by statute. Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927).

Must Show Deed Not Unreasonable or Injurious.—A conveyance of land by a wife to her husband is void when the acknowledgment fails to comply with this section, and the acknowledgment is fatally defective if the probating officer fails to certify that, at the time of its execution and the wife's privy examination, the deed is not unreasonable and injurious to her. Fisher v. Fisher, 217 N.C. 70, 6 S.E.2d 812 (1940).

No deed from a wife to her husband, conveying her land to him, is valid, unless the certifying officer shall state in his certificate his conclusions that the deed is not unreasonable or injurious to her. The statute requires that both conclusions, to wit, that the deed is reasonable and that it is not hurtful or injurious to the wife, shall be stated by the officer in his certificate attached or annexed to the deed. Caldwell v. Blount, 193 N.C. 560, 137 S.E. 578 (1927).

Notwithstanding that a wife is represented by counsel, this section requires the officer before whom she acknowledges a contract of separation or a deed to her husband to include in his certificate "his conclusions and findings of fact as to whether or not said contract is unreasonable or injurious to the wife." Joyner v. Joyner, 264 N.C. 27, 140 S.E.2d 714 (1965).

Amendment of Defective Certificate.—Where the certificate required by this section is defective, it cannot be subsequently amended so as to render a deed valid, at least after the death of the wife. Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925).

Where a deed to lands from the wife to her husband has not been properly probated before her death under the provisions of this section, the probate may not thereafter be amended so as to make the conveyance a valid one which otherwise is void. Butler v. Butler, 169 N.C. 584, 86 S.E. 507 (1915).

Effect of Properly Executed Separation Agreement on Defectively Acknowledged Deed.—A defective acknowledgment of a deed conveying the wife's interest in land to her husband is not cured by a prior deed of separation properly executed. Fisher v. Fisher, 217 N.C. 70, 6 S.E.2d 812 (1940).

Where the agreement for the execution of a quitclaim deed from a wife to her husband is an integral part of their separation agreement, the deed may not be considered

a separate and distinct transaction. The wife's obligation to execute the deed was necessarily considered by the justice of the peace before he executed the certificate, required by this section, attached to said separation agreement. Hutchins v. Hutchins, 260 N.C. 628, 133 S.E.2d 459 (1963), distinguishing Fisher v. Fisher, 217 N.C. 70, 6 S.E.2d 812 (1940).

Testimony of Wife and Probate Officer.—Where the defendant alleged that certain of the requirements of this section were observed by the officer but omitted by mistake from his certificate, testimony of the wife and the probate officer as to what transpired at the time was competent in rebuttal of the defendant's evidence, if he introduced any, and immaterial if he did not do so. Anderson v. Anderson, 177 N.C. 401, 99 S.E. 106 (1919).

Certificate Conclusively Presumed to Be True.—This section only requires that the officer taking the probate of a deed to lands from a wife to her husband shall state his conclusions that the contract or deed is not unreasonable or injurious to her, and it will be conclusively presumed that it was upon sufficient evidence; where the statutory requirements have been followed, the action of the officer taking the probate is not open to inquiry in a collateral attack in impeachment of it, except "for fraud as other judgments may be" so attacked. Frisbee v. Cole, 179 N.C. 469, 102 S.E. 890 (1920).

In the acknowledgment and execution of contracts releasing the right to support, the certificate of the officer is made by this section conclusive of the facts therein stated, but may be impeached for fraud as other judgments may be. Kiger v. Kiger, 258 N.C. 126, 128 S.E. (2d) 235 (1962).

Evidence is not admissible to show that the facts stated in the certificate are not true. Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925).

IV. EFFECT OF NONCOMPLIANCE.

Noncompliance Renders Deed Void.—The failure on the part of the probate officer to observe the requirements of the statute renders a deed absolutely void. Wallin v. Rice, 170 N.C. 417, 89 S.E. 239 (1915); Foster v. Williams, 182 N.C. 632, 109 S.E. 834 (1921); Davis v. Bass, 188 N.C. 200, 124 S.E. 566 (1924); Whitten v. Peace, 188 N.C. 298, 124 S.E. 571 (1924); Best v. Utley, 189 N.C. 356, 127 S.E. 337 (1925); Barbee v. Bumpass, 191 N.C. 521, 132 S.E. 275 (1926); Garner v. Horner, 191 N.C. 539, 132 S.E. 290 (1926); Honeycutt v. Citizens Nat. Bank, 242 N.C. 734, 89

S. E. (2d) 598 (1955); *Davis v. Vaughn*, 243 N. C. 486, 91 S. E. (2d) 165 (1956).

A deed not executed pursuant to the requirements of this section was a nullity. *Walston v. Atlantic Christian College*, 258 N. C. 130, 128 S. E. (2d) 134 (1962).

An attempted conveyance by a wife to the husband, directly or indirectly, without the private examination and certificate as required by this section, is absolutely void. *Godwin v. Wachovia Bank & Trust Co.*, 259 N. C. 520, 131 S. E. (2d) 456 (1963).

The absence of such conclusions and findings as are required by this section renders any estate or trust attempted to be set up in favor of the husband void. *Pilkington v. West*, 246 N. C. 575, 99 S. E. (2d) 798 (1957).

A conveyance of her land by a wife to her husband is void if the officer taking the acknowledgment of the wife fails to state in his certificate his conclusions that the conveyance is not unreasonable or injurious to her, as required by this section. *McCullen v. Durham*, 229 N.C. 418, 50 S.E.2d 511 (1948). See *Farmers Bank v. McCullers*, 201 N.C. 440, 160 S.E. 494 (1931).

The deed of a wife to her husband, duly acknowledged and with private examination properly certified, was held invalid in *Singleton v. Cherry*, 168 N.C. 402, 84 S.E. 698 (1915), by the unanimous opinion of the court, because of the fact that the officer taking the probate failed to certify that the making of the deed was not unreasonable and not injurious to the wife. *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915).

Oral declarations of a wife are incompetent to give validity to her deed to her husband of her separate realty, which is void for noncompliance with this section. *Shermer v. Dobbins*, 176 N.C. 547, 97 S.E. 510 (1918).

Curerative Effect of § 52-8.—Section 52-8 purports to cure the execution of a trust agreement not acknowledged as required by this section. *Godwin v. Wachovia Bank & Trust Co.*, 259 N. C. 520, 131 S. E. (2d) 456 (1963).

Conveyance by Wife to Third Person to Reconvey Estate by Entireties.—Where the parties agree that the wife should convey her separate lands to a third person who should reconvey to the husband and wife for the purpose of creating an estate by the entireties, the deeds executed to effectuate the agreement are void (now voidable) when they contain no finding that the conveyance is not unreasonable or injurious to the wife as required by this

section, since the statutory requisites for a conveyance by the wife to the husband may not be circumvented either directly or indirectly. *Brinson v. Kirby*, 251 N.C. 73, 110 S.E. (2d) 482 (1959).

Contract Void ab Initio.—A contract between husband and wife, which must be executed in the manner and form required by this section, is void ab initio if the statutory requirements are not observed. *Bolin v. Bolin*, 246 N. C. 666, 99 S. E. (2d) 920 (1957).

Partnership Agreement.—A husband and wife may enter into a partnership agreement and be answerable for the partnership debts made for or on behalf of the firm with third parties. But, as between themselves, where the partnership agreement purports to affect or change any part of the real estate of the wife or the accruing income thereof, for a longer period than three years next ensuing the making of the contract, the contract is void and unenforceable unless executed in accordance with this section. *Carlisle v. Carlisle*, 225 N.C. 462, 35 S.E.2d 418 (1945).

A separation agreement not executed in the manner required by this section and § 52-10 was void ab initio, and where execution of such agreement appeared from pleadings in a husband's action for divorce on the ground of separation, allegations of the wife's answer must be weighed in the light of this fact. *Pearce v. Pearce*, 225 N.C. 571, 35 S.E.2d 636 (1945); *Pearce v. Pearce*, 226 N.C. 307, 37 S.E.2d 904 (1946).

A contract between husband and wife, which does not purport to divest the wife of dower or the husband of courtesy, but which does fix the sum of money the wife is to receive from her husband each month thereafter, as long as the agreement remains in effect, for her support and the support of their minor child, is within the class of contracts which, in order to be valid and binding on the parties, must be executed in the manner and form required by this section, and, not being so executed, the same is void as to the wife and also as to the husband. *Daughtry v. Daughtry*, 225 N.C. 358, 34 S.E.2d 433 (1945). As to abolition of dower and courtesy and right of surviving spouse to elect life estate, see §§ 29-4, 29-30.

The wife may not be punished for contempt when she refuses to abide by an agreement which is not approved as required by this section and is void under the statute of frauds. *Wilson v. Wilson*, 261 N.C. 40, 134 S.E.2d 240 (1964).

Void Trust Agreement Cured by Incorporation into Reciprocal Wills.—Where

husband and wife executed a trust agreement, and on the same day executed reciprocal wills devising and bequeathing the property of each respectively to the trustee to be disposed of as provided in the trust agreement, it was held that the wills incorporated the trust agreement by reference so that the trust agreement took effect as a part of each will respectively, even though the trust agreement itself was void because not executed in conformity with this section. *Godwin v. Wachovia Bank & Trust Co.*, 259 N.C. 520, 131 S.E. (2d) 456 (1963).

Defective Paper Good as Color of Title. —A paper writing void for failure of compliance with this section is good as color of title. *Whitten v. Peace*, 188 N.C. 298, 124 S.E. 571 (1924); *Best v. Utley*, 189 N.C. 356, 127 S.E. 337 (1925).

If a deed not complying with this section is not color of title, it is at least some evidence, under the ancient document rule, to be submitted to the jury on the question of adverse possession for 20 or 30 years. *Owens v. Blackwood Lumber Co.*, 210 N.C. 504, 184 S.E. 804 (1936).

When Husband's Possession under Void Deed Becomes Adverse. — It seems well settled that, owing to the unity of husband and wife, adverse possession cannot exist between them so long as the coverture continues. And this is true though the husband holds a deed to the land executed by his wife to him but which is void for failure of the certificate required by this section. The possession of the husband of land conveyed to him by the wife under a void deed becomes adverse only after her death and against her heirs. There are authorities which hold that the possession of the husband does not become adverse against the wife's heirs until a demand is made for possession. *Kornegay v. Price*, 178 N.C. 441, 100 S.E. 883 (1919). See *Norwood v. Totten*, 166 N.C. 648, 82 S.E. 951 (1914).

Estoppel of Wife or Her Heirs. — Where a husband has conveyed to his wife his title to lands held by them by the entireties, and the wife thereafter conveys her

title by deed to the husband and herself, which deed is not probated under the requirements of this section with respect to the finding of the probate officer that the instrument was not unreasonable or injurious to her, the wife's conveyance is void in law, and does not operate as an estoppel by deed to her during her life or her heirs at law after her death. *Capps v. Massey*, 199 N.C. 196, 154 S.E. 52 (1930).

The land in question was held by tenants in common. The husband of one of the tenants bought the interest of another tenant, and thereafter the husband and the tenants entered into a parol agreement, and pursuant thereto deeds were exchanged between each of the tenants and the husband to effect a partition, but in the deed to the husband, signed by his wife as one of the tenants, the wife's privy examination was not taken and the certificate of the clerk was not executed as required by this section. Thereafter, the wife, prior to the effective date of the Martin Act (§ 52-2), conveyed the share allotted to her in the partition. It was held that upon the death of the wife, her husband surviving her, her inchoate dower in the share allotted to him was terminated, and even conceding that her joinder in the partition deed to him was inoperative under this section, her heirs would be estopped under the doctrine of estoppel by laches as existing prior to the Martin Act, from setting up any interest in the share allotted to him, since her valid conveyance of the share allotted to her prevented the parties from being placed in *statu quo*. *Martin v. Bundy*, 212 N.C. 437, 193 S.E. 831 (1937).

Estoppel of Husband or His Heirs. — Where a husband and wife conveyed lands owned by them by entireties to a trustee for the benefit of the husband, which deed was void because not acknowledged as required by this section, the void deed did not estop the husband or his heirs from claiming a one-half undivided interest in the lands vesting in him as tenant in common upon the rendition of an absolute divorce. *Fisher v. Fisher*, 218 N.C. 42, 9 S.E.2d 493 (1940).

§ 52-7. Validation of certificates or conveyances between husband and wife. — Any contract between husband and wife coming within the provisions of G.S. 52-6, executed prior to the first day of January, 1955, acknowledged before a notary public and containing a certificate of the notary public of his conclusions and findings of fact that such conveyance is not unreasonable or injurious to the wife, is hereby in all respects validated and confirmed, to the same extent as though said certifying officer were one of the officers named in G.S. 52-6. (1955, c. 380; 1965, c. 878, s. 1.)

Cross Reference. — See Editor's note to § 52-1.

Editor's Note. — Former § 52-7 prohibited conveyance or lease of wife's land by

husband without her consent. The provisions of present § 52-7 are almost identical to those of former § 52-12.1.

§ 52-8. Validation of contracts between husband and wife where wife is not privately examined.—Any contract between husband and wife coming within the provisions of G.S. 52-6 executed between October 1, 1954, and June 20, 1963, which does not comply with the requirement of a private examination of the wife and which is in all other respects regular is hereby validated and confirmed to the same extent as if the examination of the wife had been separate and apart from the husband. This section shall not affect pending litigation. (1957, c. 1178; 1959, c. 1306; 1965, c. 207; c. 878, s. 1.)

Cross Reference.—See Editor's note to § 52-1.

Editor's Note. — Former § 52-8 related to the capacity of a married woman to make a will. The provisions of present § 52-8 are similar to those of former § 52-12.2.

§ 52-9. Effect of absolute divorce decree on certificate failing to comply with § 52-6.—Whenever it appears that, since the execution of a contract between a husband and wife in which the certificate of acknowledgment thereof fails to comply with the requirements of G.S. 52-6, a valid decree of absolute divorce between said husband and wife has been rendered, no action shall be maintained by her or anyone claiming under her for the recovery of the possession of, or to establish title to any interest in any property described in such contract unless such action is commenced within seven (7) years after such decree of absolute divorce has become final or unless such action is commenced before May 1, 1958, whichever date is later. (1957, c. 1260; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's note to § 52-1.

Editor's Note. — Provisions similar to former § 52-9 are now contained in present

This section is a curative statute. *Hutchins v. Hutchins*, 260 N.C. 628, 133 S.E.2d 459 (1963).

Curative Effect of § 52-8. — See same catchline in note to § 52-6, analysis line IV.

§ 52-10. Contracts between husband and wife generally; releases.—Contracts between husband and wife not forbidden by G.S. 52-6 and not inconsistent with public policy are valid, and any persons of full age about to be married, and, subject to G.S. 52-6, any married persons, may, with or without a valuable consideration, release and quitclaim such rights which they might respectively acquire or may have acquired by marriage in the property of each other; and such releases may be pleaded in bar of any action or proceeding for the recovery of the rights and estates so released. (1871-2, c. 193, s. 28; Code, s. 1836; Rev., s. 2108; C. S., s. 2516; 1959, c. 879, s. 12; 1965, c. 878, s. 1.)

Cross References.—See Editor's note to § 52-1. See also § 52-6 and note thereto. As to abolition of dower and courtesy and right of surviving spouse to elect life estate, see §§ 29-4, 29-30.

Editor's Note. — Provisions similar to former § 52-10 are now contained in present § 52-4. The provisions of present § 52-10 are similar to those of former § 52-13.

At common law the husband and wife were regarded as so entirely one as to be incapable of either contracting with or suing one another, but in equity it was always otherwise, and there many of their contracts with each other were recognized and enforced. *George v. High*, 85 N.C. 99 (1881).

Legislature Did Not Intend to Reduce Marriage to Commercial Basis.—While in ordinary transactions married women are

§ 52-3. The provisions of present § 52-9 are almost identical to those of former § 52-12.3.

permitted to deal with their earnings and property practically as they please or as free traders, the General Assembly did not intend to reduce the institution of marriage, or the obligations of family life, to a commercial basis. *Ritchie v. White*, 225 N.C. 450, 35 S.E.2d 414 (1945).

Section Inapplicable to Right of Wife to Support. — This section relates to the release of an interest in property, but has no bearing whatever on the right of a wife to support. *Motley v. Motley*, 255 N.C. 190, 120 S.E. (2d) 422 (1961).

What Contracts Included.—This section clearly refers throughout to contracts between the husband and the wife, and does not and was not intended to affect the contracts between the husband and the wife and third parties. *Jackson v. Beard*, 162 N.C. 105, 78 S.E. 6 (1913).

Money Lent to Husband Recoverable.—In a suit brought by a wife against the administrator of her deceased husband for money “advanced and lent” to him during the coverture, where the marriage took place since the adoption of the Constitution of 1868, it was held that the contract between them was not inconsistent with public policy, and was, therefore, valid. George v. High, 85 N.C. 99 (1881).

Rent Notes Given Wife by Husband Valid.—Where a husband occupied his wife’s land for nine years, during the whole of which period he received the rents therefrom, under an express agreement with his wife to account to her for such rents, and each year gave his wife a note for the rent, it was held that the notes constitute a valid indebtedness on the part of the husband to his wife. Battle v. Mayo, 120 N.C. 413, 9 S.E. 384 (1897).

Antenuptial Agreement.—A woman in contemplation of marriage is expressly authorized by this section to release by valid contract her right of dower in the lands of intended husband. Turner v. Turner, 242 N.C. 533, 89 S.E. (2d) 245 (1955).

In the absence of contrary provisions in an antenuptial agreement, or of special statutory provisions, a separation and reconciliation between husband and wife will not affect or extinguish property rights under such an agreement. Turner v. Turner, 242 N.C. 533, 89 S.E. (2d) 245 (1955).

§ 52-10.1. Separation agreements; execution by minors.—Any married couple, both of whom are eighteen years of age or over, is hereby authorized to execute a separation agreement which shall be legal, valid, and binding in all respects as if they were both twenty-one years of age, provided, that if either the husband or the wife, or both, are under the age of twenty-one years, the separation agreement must be acknowledged by the husband before a clerk of the superior court and executed by the wife before a clerk of the superior court in conformity with G.S. 52-6. (1965, c. 803.)

Editor’s Note.—The act inserting this section designated it as § 52-13.1 to follow former § 52-13 in article 1 of chapter 52 prior to the repeal and revision of that chapter by Session Laws 1965, c. 878. This

§ 52-11. Antenuptial contracts and torts.—The liability of a married person for any debts owing, or contracts made or damages incurred before marriage shall not be impaired or altered by such marriage. No person shall by marriage incur any liability for any debts owing, or contracts made, or for wrongs done by his or her spouse before the marriage. (1871-2, c. 193, ss. 13, 14; Code, ss. 1822, 1823; Rev., ss. 2101, 2106; C. S., s. 2517; 1965, c. 878, s. 1.)

Cross Reference.—See Editor’s note to § 52-1.

Editor’s Note.—Former § 52-11 was repealed by Session Laws 1943, c. 543. The provisions of present § 52-11 are similar to those of former § 52-14.

Separation Agreement Valid.—A deed of separation executed by the husband and wife is not against the policy of this State, when properly made in accordance with § 52-6. Archbell v. Archbell, 158 N.C. 408, 74 S.E. 327 (1912).

A release by a husband of his right of tenancy by the courtesy in his wife’s lands by properly executed contract with his wife is expressly authorized by this section with the added provision that such release may be pleaded in bar of any proceeding to recover the rights released. Blakenship v. Blakenship, 234 N.C. 162, 66 S.E. (2d) 680 (1951).

The language of a separation agreement that the husband released “all rights” that he might have “in any estate” of his wife at her death is sufficient to support the conclusion that a release of his right of tenancy by the courtesy was intended. The word “estate” as here used is comprehensive enough to include land. Blakenship v. Blakenship, 234 N.C. 162, 66 S.E. (2d) 680 (1951).

Mutual Releases Do Not Bar Wife’s Right to Temporary Alimony.—Mutual releases between husband and wife of their interests in each other’s separate property do not bar the wife from making application for temporary alimony and attorney’s fee in a subsequent suit for divorce. Bailey v. Bailey, 127 N.C. 474, 37 S.E. 502 (1900).

section has been redesignated herein as § 52-10.1, since the provisions of present §§ 52-10 are similar to those of former § 52-13.

Wife May Appoint Husband as Agent.—A wife may appoint her husband to act as her agent to settle her antenuptial debts in the same manner as one sui juris may appoint an agent, and compliance with the requirements of § 52-6 is not necessary.

Stout v. Perry, 152 N.C. 312, 67 S.E. 757 (1910).

Where prior to their marriage the wife incurs liability for negligent injury to the

husband the subsequent marriage does not affect her liability. *Shirley v. Ayers*, 201 N.C. 51, 158 S.E. 840 (1931).

§ 52-12. Postnuptial crimes and torts.—No married person shall be liable for damages accruing from any tort committed by his or her spouse, or for any costs or fines incurred in any criminal proceeding against such spouse. (1871-2, c. 193, s. 25; Code, s. 1833; Rev., s. 2105; C. S., s. 2518; 1921, c. 102; 1965, c. 878, s. 1.)

Cross Reference.—See Editor's note to § 52-1.

Editor's Note. — Provisions similar to former § 52-12 are now contained in present § 52-6. The provisions of present § 52-12 are similar to those of former § 52-15.

At common law the husband was liable for the tort of his wife, although committed without his knowledge or consent and in his absence, and although husband and wife were living separate at the time, on the ground that "as her legal existence was incorporated in that of her husband, she could not be sued alone, and if the husband was protected from responsibility the injured party would be without redress." *Roberts v. Lisenbee*, 86 N.C. 136 (1882). This principle was modified by Laws

1871-2, c. 193, s. 25 (this section as it was formerly), so that the husband could only be held liable for torts committed while the husband was living with the wife. *Young v. Newsome*, 180 N.C. 315, 104 S.E. 660 (1920). By Laws 1921, c. 102, a provision abolishing the husband's liability for the torts of his wife was substituted for the former provision.

For cases decided under the former law, see *Roberts v. Lisenbee*, 86 N.C. 136 (1882); *Presnell v. Moore*, 120 N.C. 390, 27 S.E. 27 (1897); *Brittingham v. Stadiem*, 151 N.C. 299, 66 S.E. 128 (1909); *Young v. Newsome*, 180 N.C. 315, 104 S.E. 660 (1920).

Applied in *Burton v. Dixon*, 259 N.C. 473, 131 S.E. (2d) 27 (1963).

Chapter 52A.

Uniform Reciprocal Enforcement of Support Act.

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§ 52A-1. Short title.—This chapter may be cited as the "Uniform Reciprocal Enforcement of Support Act." (1951, c. 317.)

Cross Reference.—As to special county attorneys and their duties with respect to proceedings under this chapter, see §§ 108-14.01 to 108-14.03.

Editor's Note.—For brief comment on this chapter, see 29 N.C. Law Rev. 423.

For note on conflict of laws, see 34 N.C. Law Rev. 126.

History of Uniform Act.—*Mahan v. Read*, 240 N.C. 641, 83 S.E. (2d) 706 (1954).

§ 52A-2. Purposes.—The purposes of this chapter are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto. (1951, c. 317.)

§ 52A-3. Definitions.—As used in this chapter unless the context requires otherwise.

(1) "State" includes any state, territory or possession of the United States and the District of Columbia in which this or a substantially similar reciprocal law has been enacted.

(2) "Initiating state" means any state in which a proceeding pursuant to this or a substantially similar reciprocal law is commenced.

(3) "Responding state" means any state in which any proceeding pursuant to the proceeding in the initiating state is or may be commenced.

(4) "Court" means any court of record in this State having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding, and when the context requires, means the court of any other state as defined in a substantially similar reciprocal law.

(5) "Law" includes both common and statute law.

(6) "Duty of support" includes any duty of support imposed or imposable by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise.

(7) "Obligor" means any person owing a duty of support.

(8) "Obligee" means any person to whom a duty of support is owed. (1951, c. 317; 1955, c. 699, s. 1; c. 1035, s. 1; 1959, c. 1123, s. 1.)

Editor's Note.—The first 1955 amendment, effective July 1, 1955, rewrote subdivision (4), and the second 1955 amendment, also effective July 1, 1955, added "or domestic relations court" at the end of said subsection.

The 1959 amendment deleted from subdivision (4) a provision that proceedings in which this State is the "initiating state" shall be commenced in the superior court or domestic relations court.

§ 52A-4. Remedies additional to those now existing.—The remedies herein provided are in addition to and not in substitution for any other remedies. (1951, c. 317.)

§ 52A-5. Obligor present in State is bound.—Duties of support arising under the law of this State when applicable under G. S. 52A-8, bind the obligor, present in this State, regardless of the presence or residence of the obligee. (1951, c. 317; 1955, c. 699, s. 2.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

§ 52A-6. Interstate rendition.—The Governor of this State (1) may demand from the governor of any other state the surrender of any person found in such other state who is charged in this State with the crime of failing to provide for the support of any person in this State and (2) may surrender on demand by the governor of any other state any person found in this State who is charged in such other state with the crime of failing to provide for the support of a person in such other state. The provisions for extradition of criminals not inconsistent herewith shall apply to any such demand although the person whose surrender is demanded was not in the demanding state at the time of the commission of the crime and although he had not fled therefrom. Neither the demand, the oath nor any proceedings for extradition pursuant to this section need state or show that the person whose surrender is demanded has fled from justice, or at the time of the commission of the crime was in the demanding or the other state. (1951, c. 317.)

§ 52A-7. Relief from the above provisions.—Any obligor contemplated by G. S. 52A-6, who submits to the jurisdiction of the court of such other state and complies with the court's order of support, shall be relieved of extradition for desertion or nonsupport entered in the courts of this State during the period of such compliance: Provided, however, that an obligor may not upon his ex parte petition avail himself of the provisions of this chapter. (1951, c. 317; 1955, c. 699, s. 3.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, added the proviso.

§ 52A-8. What duties are applicable.—Duties of support applicable under this chapter are those imposed or imposable under the laws of any state where the obligor was present during the period or any part of the period for which support is sought. The obligor is presumed to have been present in the responding state during the period for which support is sought until otherwise shown. (1951, c. 317; 1955, c. 699, s. 4.)

Editor's Note. — The 1955 amendment, effective July 1, 1955, substituted "applicable" for "enforceable," added the second sentence and made other changes.

§ 52A-8.1. Remedies of a county furnishing support.—Whenever a county of this State furnishes support to an obligee, it has the same right to invoke the provisions hereof as the obligee to whom the support was furnished for the purpose of securing reimbursement for such support and of obtaining continuing support with the exception that the term obligee as used in this section shall not apply to children owing the duty of support to their parents. (1959, c. 1123, s. 4.)

§ 52A-9. How duties of support are enforced.—All duties of support are enforceable by action irrespective of relationship between the obligor and obligee. Jurisdiction of all proceedings hereunder shall be vested in any court of record in this State having jurisdiction to determine liability of persons for the support of dependents in any criminal proceeding. (1951, c. 317; 1955, c. 699, s. 5; c. 1035, s. 2½; 1959, c. 1123, s. 2.)

Editor's Note. — The first 1955 amendment, effective July 1, 1955, rewrote the second sentence, and the second 1955 amendment, also effective July 1, 1955, inserted the words "or domestic relations court" in said sentence.

The 1959 amendment rewrote the second sentence.

Jurisdiction of County Recorders' Courts.—Courts established pursuant to the authority given by § 7-218 now have jurisdiction to hear and determine complaints filed pursuant to this article. *State v. Lowe*, 254 N. C. 631, 119 S. E. (2d) 449 (1961).

Jurisdiction of Parties.—The Uniform Reciprocal Enforcement of Support Act applies only where the obligee is present in the initiating state and the obligor is subject to the jurisdiction of the responding state. *Mahan v. Read*, 240 N. C. 641, 83 S. E. (2d) 706 (1954).

In a proceeding under the Uniform Reciprocal Enforcement of Support Act, the court of the initiating state, by approval of the petition and the certification of the documents, enables petitioner

to submit herself to the jurisdiction of responding state without the necessity of personal presence or employment of counsel, and the responding state acquires jurisdiction of the respondent through service of summons and notice. *Mahan v. Read*, 240 N. C. 641, 83 S. E. (2d) 706 (1954).

Where Obligee Has Removed to a Third State at Time of Hearing.—Where, after filing petition under the Uniform Reciprocal Enforcement of Support Act of the initiating state, the obligee moves to another state and is a resident of such third state at the time of the hearing in North Carolina, the responding state, the North Carolina court has no jurisdiction to make an award for transmittal to the initiating state for transmittal in turn to the petitioner in the third state, and judgment of nonsuit and dismissal should have been entered in the North Carolina court upon motion. *Mahan v. Read*, 240 N. C. 641, 83 S. E. (2d) 706 (1954).

Children as Real Parties in Interest.—Petitioner, who was divorced from de-

fendant in Arkansas, could not maintain an action for support of their children against defendant in North Carolina though action was initiated in Arkansas, since children the real parties in interest were not represented by either their guardian or by duly appointed next friend, as required by § 1-64. This result was not affected by a provision of the law of Arkansas that a petition under the act

might be brought in behalf of a minor obligee without appointment of guardian or next friend, since the rights of the parties are determinable in the court having jurisdiction of respondent, and the cause here must be so constituted as to conform to North Carolina law. *Mahan v. Read*, 240 N. C. 641, 83 S. E. (2d) 706 (1954).

§ 52A-10. Contents of complaint for support.—Actions hereunder shall be commenced by the issuance of summons in the form required for actions for alimony without divorce by the court having jurisdiction. The complaint shall be verified and shall state the name and, so far as known to the plaintiff, the address and circumstances of the defendant and his dependents for whom support is sought and all other pertinent information. The plaintiff may include in or attach to the complaint any information which may help in locating or identifying the defendant including, but without limitation by enumeration, a photograph of the defendant, a description of any distinguishing marks of his person, other names and aliases by which he has been or is known, the name of his employer, his fingerprints, or Social Security number. (1951, c. 317; 1955, c. 699, s. 6.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, added at the end of the first sentence the words "by the court

having jurisdiction." It also added the third sentence.

§ 52A-10.1. Official to represent plaintiff.—It shall be the duty of the official who prosecutes criminal actions for the State in the court acquiring jurisdiction to appear on behalf of the plaintiff in proceedings under this chapter. (1955, c. 699, s. 6; 1959, c. 1123, s. 3.)

Editor's Note.—The 1959 amendment deleted from the end of this section the words "when this State is a responding state as defined in G. S. 52A-3."

§ 52A-10.2. Complaint by minor.—A complaint on behalf of a minor obligee may be brought by a person having legal custody of the minor without appointment as next friend. (1955, c. 699, s. 6.)

Editor's Note.—The act inserting this section became effective July 1, 1955.

§ 52A-11. Duty of court of this State as initiating state.—If the court of this State acting as initiating state and from the return on the summons and the verified complaint the clerk of the court finds that the defendant is not to be found in this State, that the complaint sets forth facts from which it may be determined that the defendant owes a duty of support, and that a court of the responding state may obtain jurisdiction of the defendant or his property, it shall so certify and shall cause three copies of (1) the complaint, (2) its certificate, and (3) this chapter, to be transmitted to the court or other designated agency in the responding state. If the name and address of such court is unknown and the responding state has an information agency, the court of this State shall cause such copies to be transmitted to the state information agency or other proper official of the responding state, with a request that it forward them to the proper court, and that the court of the responding state acknowledge their receipt to the court of this State. (1951, c. 317; 1955, c. 699, s. 7; c. 1035, s. 2.)

Editor's Note.—The 1955 amendments, effective July 1, 1955, rewrote this section.

§ 52A-11.1. Fees and costs.—A court of this State acting as a responding state may in its discretion direct that any part of all fees and costs incurred

in this State, including without limitation by enumeration, fees for filing, service of process, and seizure of property, shall be paid by the county, but when an order of support is entered against a defendant, he shall be taxed with the costs. The clerk of court, when this State is the initiating state, may upon a certification by the county director of public welfare of the indigency of the plaintiff, waive all fees and costs incurred in filing a petition hereunder. (1955, c. 699, s. 7; c. 1035, s. 2; 1961, c. 186.)

Editor's Note.—The first 1955 act as amended by the second 1955 act, both effective July 1, 1955, inserted this section. 637, 94 S. E. (2d) 846 (1956). The 1961 amendment substituted "director" for "superintendent" in line seven.

§ 52A-12. Duty of the court of this State as responding state.—When the court of this State, acting as a responding state, receives from the court of an initiating state the aforesaid copies, it shall (1) docket the cause, (2) notify the prosecutor of criminal actions for the state in said court as described in G. S. 52A-10.1, (3) set a time and a place for a hearing, and (4) take such action as is necessary in accordance with the laws of this State to obtain jurisdiction. The procedure for serving notice and summons on the defendant under this chapter shall be the same as in actions for alimony without divorce as provided by G. S. 50-16. (1951, c. 317; 1955, c. 699, s. 8.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

Responding State Determines Substantive Rights of Parties.—Under the Uniform Reciprocal Enforcement of Support Act the initiating state has no jurisdiction to make any determination affecting the substantive rights of the parties, and

therefore, a conclusion by a court of North Carolina, the responding state, that the duty of respondent to support the children in question had already been found to exist by a court of competent jurisdiction of the initiating state, was erroneous. *Mahan v. Read*, 240 N. C. 641, 83 S. E. (2d) 706 (1954).

§ 52A-12.1. Further duty of responding court.—If a court of this State, acting as a responding state, is unable to obtain jurisdiction of the defendant or his property, the court shall communicate this fact to the court in the initiating state, and if information is obtained by the court of the defendant's whereabouts in another part of this State, the court shall forward the papers to such other court of this State as may obtain jurisdiction of the defendant. (1955, c. 699, s. 8.)

§ 52A-13. Order of support.—If the court of the responding state finds a duty of support, it may order the defendant to furnish support or reimbursement therefor and subject the property of the defendant to such order. (1951, c. 317.)

§ 52A-14. Responding state to transmit copies to initiating state.—The court of this State when acting as a responding state shall cause to be transmitted to the court of the initiating state a copy of all orders of support or for reimbursement therefor. (1951, c. 317.)

§ 52A-15. Additional powers of court.—In addition to the foregoing powers, the court of this State when acting as the responding state has the power to subject the defendant to such terms and conditions as the court may deem proper to assure compliance with its orders and in particular:

(a) To require the defendant to furnish recognizance in the form of a cash deposit or bond of such character and in such amount as the court may deem proper to assure payment of any amount required to be paid by the defendant.

(b) To require the defendant to make payments at specified intervals to the clerk of the court and to report personally to such clerk at such times as may be deemed necessary.

(c) To punish the defendant who shall violate any order of the court to the

same extent as is provided by law for contempt of the court in any other suit or proceeding cognizable by the court. (1951, c. 317; 1955, c. 699, s. 9.)

Editor's Note.—The 1955 amendment, "or the obligee" formerly appearing after effective July 1, 1955, deleted the words "court" in subsection (b).

§ 52A-16. Additional duties of the court of this State when acting as a responding state.—The court of this State when acting as a responding state shall have the following duties which may be carried out through the clerk of the court:

(a) Upon the receipt of a payment made by the defendant pursuant to any order of the court or otherwise, to transmit the same forthwith to the court of the initiating state, and

(b) Upon request to furnish to the court of the initiating state a certified statement of all payments made by the defendant. (1951, c. 317.)

§ 52A-17. Additional duty of the court of this State when acting as an initiating state.—The court of this State when acting as an initiating state shall have the duty which may be carried out through the clerk of the court to receive and disburse forthwith all payments made by the defendant or transmitted by the court of the responding state. (1951, c. 317.)

§ 52A-18. Evidence of husband and wife.—Laws attaching a privilege against the disclosure of communications between husband and wife are inapplicable to proceedings under this chapter. Husband and wife are competent witnesses to testify to any relevant matter, including marriage and parentage. (1951, c. 317.)

§ 52A-19. Rules of evidence.—In any hearing under this law, wherein the defendant has been served with notice and summons as herein provided, the verified complaint of the plaintiff shall be admissible as *prima facie* evidence of the facts therein stated in any court of this State having jurisdiction to conduct hearings pursuant to this chapter. In those cases where the defendant fails to appear after service of notice and summons, the court may enter a reasonable order for support. Upon proper motion of the defendant, the reasonableness of the order may be reconsidered by the court, and upon a showing by the defendant that the order is not within his financial ability to pay, is beyond his earning capacity, or for other good cause shown, such order shall be subject to modification from time to time. The order fixed by the court shall also be subject to modification from time to time upon motion of the plaintiff. (1951, c. 317; 1955, c. 699, s. 10.)

Editor's Note.—The 1955 amendment, effective July 1, 1955, rewrote this section.

§ 52A-20. Interpretation of chapter.—This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states having a substantially similar act. (1955, c. 699, s. 12.)

Editor's Note.—The act from which this section was derived became effective July 1, 1955.

1965 CUMULATIVE SUPPLEMENT

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

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I, Thomas Wade Bruton, Attorney General of North Carolina, do hereby certify that the foregoing 1965 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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